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In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR
and
UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. May a court modify a consent decree to impose multi-million dollar annual obligations on defendants without holding an evidentiary hearing on disputed material facts?

2. May a court modify a consent decree to impose obligations on defendants which defendants cannot comply with as a matter of law?

3. Did the court err in refusing to modify a consent decree by not allowing implementation of federal policy underlying the program established by the decree?

TABLE OF PARTIES

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR; AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; KEVIN QUINN, KAYSI FARRELL, RUTH G. WEISS; JOHN KLINKNER, ELIZABETH S. BIEZ; MONA SHULMAN

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA; RUSSELL E. TRAIN, Individually and as Administrator of the Environmental Protection Agency; WILLIAM T. SHERLOCK, Individually and as Secretary of the Pennsylvania Department of Transportation; MAURICE K. GODDARD, Individually and as Secretary of the Pennsylvania Department of Environmental Resources; DANIEL J. SNYDER, III, Individually and as Regional Administrator of the Environmental Protection Agency, Region III

Defendants

(D.C. Civil No. 76-2068)

UNITED STATES OF AMERICA

Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA; the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

Defendants

(D.C. Civil No. 77-0619)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Commonwealth of Pennsylvania, the Pennsylvania Department of Transportation, Thomas D. Larson, Secretary of Pennsylvania Department of Transportation, the Pennsylvania Department of Environmental Resources, and Peter Duncan, Secretary of the Pennsylvania Department of Environmental Resources petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which entered in this case on March 1, 1982. The petition for rehearing en banc was denied on March 26, 1982.

I. OPINIONS OF THE COURT BELOW

The three opinions of the District Court dated May 20, 1981, June 16, 1981 and July 14, 1981 are not yet reported and are printed in the Appendix, pp. 1a-16a. The opinion of the Court of Appeals dated March 1, 1982 is printed in the Appendix, pp. 17a-43a and is reported at 674 F.2d 976 to 987 (pages 987 starting at the words "Sur Petition for Rehearing" to page 990, inclusive, have been inadvertently printed, as they apply to a separate and a later appeal involving this case). The order of the Court of Appeals dated March 26, 1982, denying a petition for rehearing en banc is not reported and is printed in the Appendix, pp. 44a-45a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1982 and the petition for rehearing was denied on March 26, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

III. STATEMENT OF THE CASE

This action was commenced in July of 1976 by Delaware Valley Citizens Council for Clean Air[1] (hereinafter "Delaware Valley") against the Commonwealth of Pennsylvania and certain of its officials.[2] Plaintiff sought to compel the Commonwealth defendants to implement an emission inspection program in fourteen of Pennsylvania's 67 counties. Also named as a defendant was an official of the United States Environmental Protection Agency whom plaintiff sought to compel to have the Commonwealth defendants implement an emission inspection and maintenance program (hereinafter "I/M program").[3] Plaintiff based its complaint on the Clean Air Act of 1970, 42 U.S.C. §1857, et seq. (since amended and reclassified in 42 U.S.C. §7401 et seq.). In February, 1977, the United States commenced a second suit seeking to compel defendants to implement an emission inspection program. As a result, Delaware Valley dismissed the United States as a defendant in its action.

Both of these cases were settled by entry of a consent decree on August 29, 1978, prior to a determination of any

[1] Delaware Valley is a nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania.

[2] William T. Sherlock, Secretary of the Pennsylvania Department of Transportation and Maurice K. Goddard, Secretary of the Pennsylvania Department of Environmental Resources.

[3] An emission inspection and maintenance program consists of checking the tailpipe emissions (hydrocarbons and carbon monoxide) of vehicles by means of an analyzer and requiring that vehicles which exceed a specified level of emissions have repairs performed to lower their emissions to the specified level.

of the claims on the merits (46a-66a). The consent decree provided for the emission inspection of certain vehicles in ten counties in Pennsylvania. The inspections were to be performed by private garages which opted to join the program unless the General Assembly of Pennsylvania authorized a franchise system.[4] If the emissions of a vehicle were above a set level, repairs were required to reduce the emissions. When the emissions of a tested vehicle were below the set level, a certificate of emission inspection would be placed on that vehicle. Legislation for a franchise system was not approved by the legislature. Accordingly, defendants proceeded with implementation of the emission inspection program using private garages (a decentralized system) under authority of existing legislation.

On March 7, 1980, this consent decree was modified by agreement of all parties (67a-74a). The modification extended certain attainment dates (implemenation was extended from August 1, 1980 to May 1, 1981) and provided for quarterly visits to the private inspection stations by Pennsylvania Department of Transportation personnel to check the emission analyzer, and the performance of a study to investigate monthly checks of stations. The Department of Transportation reserved the right to select the visit cycle and plaintiff reserved the right to challenge this system.

A key element of the I/M program was the type of emission analyzer to be used for the program. When the consent decree was signed, the only analyzer available was the BAR 74 category (an analyzer manufactured in compliance with prescribed specifications). Subsequently the newer and more accurate BAR 80 analyzer (ordered by the

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[4] A franchise system is a system whereby one contractor is selected to construct and to operate emission inspection stations.

district court on June 16, 1981) was developed. EPA had also begun development of a newer analyzer for this program. On September 24, 1980, EPA released their national policy statement recommending that all states with a private garage inspection program (such as Pennsylvania) use this new analyzer. The statement also provided for an extension of time to implement the program to provide for necessary design and manufacturing time. This national policy was supported by technical reports, which explained the significant benefits to the program by using this new analyzer.

Relying on this national policy of EPA and the EPA reports, Defendants began negotiations to modify the consent decree to extend the implementation date of the I/M program from May 1, 1981 to January 1, 1983 to allow the change to the new analyzer. Following lengthy negotiations EPA and defendants agreed in April, 1981 to modify the consent decree. Delaware Valley, the other plaintiff, agreed in principle, but refused to agree to the modification because defendants would not agree to the payment of $200,000 to Delaware Valley to support the other programs of Delaware Valley. Delaware Valley had also demanded reimbursement of all costs so that they could oversee the program and that the program be continued in the future regardless of any changes to Federal laws and regulations.

On April 29, 1981, defendants filed a motion to modify the consent decree and on May 1, 1981, defendants requested the district court to stay the consent decree. On May 1, 1981, Delaware Valley filed a motion to find defendants in violation of the consent decree and to modify the consent decree. On May 6, 1981, the district court Judge convened an informal conference with all parties to discuss the procedure for resolution of this matter, requested EPA to file a report by May 20, 1981 and requested

all parties to continue with negotiations to modify the consent decree. The EPA report was filed on May 20, and within hours, without permitting defendants to review or comment on this report and without any hearing or testimony, the district court denied defendants' motion to stay and to modify the consent decree, found defendants in violation of the consent decree, and ordered defendants to submit an implementation plan by June 1, 1981. In the May 20 order, the district court also denied the motion of Delaware Valley to modify the consent decree to require monthly checks of stations, use of referee stations and certification of a set number of stations. Delaware Valley did not appeal this order.

On June 1, 1981, defendants filed a motion for reconsideration of the May 20 order and the implementation plan. On June 8, 1981, plaintiffs filed their objections to the plan. Delaware Valley renewed its prior request to modify the consent decree. At the hearing before the district court on June 10, 1981, defendants objected to the modifications requested by Delaware Valley, informed the court that witnesses were present in the courtroom to testify relative to those modifications and requested an evidentiary hearing. The court refused to permit any testimony. On June 16, 1981, the district court issued an order denying the motion for reconsideration and modified the consent decree by requiring the defendants check every station on a monthly visit (an additional annual cost of about $1-2 million), certify 3,000 stations; and to use referee stations as a consumer protection mechanism.

On June 26, 1981, defendants filed a motion for reconsideration of the order of June 16. On July 14, 1981, the district court denied this motion without any opinion.

Defendants appealed these orders to the court of appeals. On March 1, 1982, the court of appeals upheld the orders of the district court, holding that the district court did not abuse its discretion in modifying the consent decree as requested by Delaware Valley and in denying the modification as requested by defendants. Defendants filed a petition for rehearing en banc. On March 26, 1982, the court of appeals denied this petition.[5]

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[5] On October 15, 1981, the Pennsylvania Legislature over the Governor's veto passed House Bill 456 which prohibited the expenditure of funds to implement the I/M program. As a result defendants were forced to cease implementation of the program. Based on this action, the district court issued an order finding defendants in contempt and ordered the withholding of Federal aid highway monies from Pennsylvania as a sanction for that contempt. On May 21, 1982, the court of appeals affirmed that order.

IV. REASONS FOR GRANTING THE WRIT

A. The Lower Court's Order Modifying a Consent Decree Without an Evidentiary Hearing Violates Due Process and Conflicts With This Court's Holding in Hughes v. United States, 342 U.S. 353 (1952)

In this case, the district court modified a consent decree in significant ways without holding an evidentiary hearing on disputed facts material to its decision. The court of appeals affirmed, holding that the modifications made by the district court were "contemplated by the decree itself" and that, therefore, no evidentiary hearing was required concerning those modifications. To the contrary, however, in light of the district court's heavy reliance on disputed facts in justifying the modifications, its refusal to hold an evidentiary hearing was a clear violation of due process and in direct conflict with this Court's holding in *Hughes v. United States*, 342 U.S. 353 (1952).

In *Hughes*, the parties entered into a consent decree which required the defendant either to sell certain stock or to deposit that stock with a court-designated trustee. The defendant chose to deposit the stock with a trustee. Subsequently, without holding an evidentiary hearing and over defendant's protest, the lower court modified the decree to require the trustee to sell the stock. This Court reversed, holding that while such a modification might be justifiable, it was inappropriate "without a hearing that included evidence and a judicial determination based on it." *Id.* at 358.

In this case, as in *Hughes*, the district court modified a consent decree without holding an evidentiary hearing. Likewise, as in *Hughes*, the modifications in this case could be justified only on the basis of "a hearing that included evidence and a judicial determination based on it." Finally, as in *Hughes*, the lower court ignored defendants' protests that an evidentiary hearing was required. Thus, the decision in this case directly conflicts with this Court's holding in *Hughes*.

This conflict exists because of the district court's heavy reliance on disputed facts to justify those modifications even if the Third Circuit was correct that the modifications made by the district court were contemplated by the consent decree. Specifically, the district court modified the consent decree, *inter alia*:

> (1) to require monthly on-site audits of auto emission inspections stations by the Commonwealth, and
>
> (2) to require the Department of Transportation to open two "referee" stations to review consumer complaints.
>
> (3) to require the Department of Transportation to certify 3,000 stations.

It based both modifications on its finding, *as a matter of fact*, that the procedures required by those modifications were more effective than those proposed by the Commonwealth. Yet, it refused to hear evidence relative to that finding. The requirement to certify 3,000 stations is not only not contained in the consent decree but the district court ordered this on the bland request of Delaware Valley.

Moreover, to the extent that the consent decree itself "contemplated" the modifications ordered by the lower

court, it did so only if, as a matter of fact, those procedures were more effective than those proposed by the Commonwealth. Thus, the consent decree provided no basis for foregoing a hearing on the disputed and material facts. To the contrary, it clearly contemplated and required such a hearing.

The due process implications of the lower court decisions should be clear. Certainly, a party is entitled to notice and a hearing before a court makes factual determinations on which it bases the imposition of multi-million dollar obligations on that party. Defendants received Delaware Valley's motion for these three modifications only 24 hours before the hearing on June 10, 1981. Nonetheless, in this case, without holding a hearing, the district court ordered modifications in the consent decree which will require the expenditure of millions of additional dollars by defendants. The additional personnel costs to check stations on a monthly basis will require an additional annual cost of from $1 to $2 million dollars.

As importantly, if a court has the power to modify consent decrees in such a way as to impose substantial additional obligations without an evidentiary hearing, and over the objections of a party, few, if any, parties will be willing to enter into such agreements. In this day of burgeoning litigation in the federal courts all methods of settlement should be encouraged. A consent decree cannot be used as a tool to cause harm. This is what Delaware Valley wants and what the court has done. See *United States v. Swift*, 286 U.S. 106 at 115.

The strong disincentive to settlement created by the lower courts, therefore, presents an issue of public importance. For that reason, and, in addition, because those deci-

sions conflict with this Court's decision in *Hughes*, this Court should grant review in this case.

B. The Court Below Ordered a Modification Which Usurps State Legislative Powers and Which Defendants Have No Power To Implement

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The district court also modified the consent decree to require that the Department of Transportation certify a minimum of 3,000 emission inspection stations for this program. The consent decree specifies that inspection will be performed by private stations that satisfy the regulations of the Department of Transportation. In order to be certified, the private inspection stations must apply for certification, purchase an approved emission analyzer, hire a certified emission mechanic and comply with other requirements. The consent decree contains no requirement for the certification of any set number of stations. The court of appeals agreed that no such explicit requirement existed.

Moreover, entrance into the program, by private stations, is purely discretionary: there is no law allowing the state to force participation. Indeed, the court of appeals acknowledged that "the Commonwealth cannot force privately-owned garages to participate in the I/M program", but called this legal impediment a "distraction" and held that the defendants must have 3,000 inspections stations in the program notwithstanding that impediment. In so doing, the court of appeals found that if 3,000 stations did not voluntarily join the program, the Department could simply establish its own inspection stations. This is a major and devastating error by the court.

There is no authority in any state law which permits the Department to establish state inspection stations. The court's solution thus requires that the State Legislature pass legislation totally altering the existing administrative and operations functions of the state agencies by establishing, operating and funding a system of inspection stations. This is a significant intrusion into the doctrines of separation of powers and federalism. See *Rizzo v. Goode*, 423 U.S. 362, 46 L.Ed. 2d 561, 96 S.Ct. 598 (1976); *Hills v. Gautreaux*, 425 U.S. 282 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974).

This modification should be reversed because it is not required by the consent decree, because defendants have no power to compel a private businessman to purchase equipment and to seek certification as an emission inspection station, and because the so-called solution by the court of appeals is contrary to the doctrines of separation of powers and federalism.

C. The Court Below Erred in Denying the Modification of the Consent Decree Requested by Defendants and in Finding Defendants in Violation of the Decree

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Defendants requested the district court to modify the consent decree to postpone the implementation date of the I/M program from May 1, 1981 until January 1, 1983 in order to use a new emission analyzer which was developed by EPA and strongly recommended by EPA. On May 20, 1981, the district court denied this motion and found defendants in violation of the consent decree since Defendants had not begun the inspection of vehicles on May 1, 1981.

In so doing, the court ignored the strong federal policy in support of defendants' requested modification, and, therefore, abused its discretion.

In this regard, an emission analyzer is the device used to measure the exhaust emissions of a vehicle and determines whether a vehicle passes or fails the inspection. When the consent decree was signed (1978) the only analyzer available was the BAR 74 analyzer. Subsequently the newer and more accurate BAR 80 analyzer (ordered by the district court on June 16, 1981) was developed.

EPA had also begun development of a newer analyzer for this program. On September 24, 1980, EPA released their National Policy Statement and recommended that all states with a decentralized inspection program (such as in Pennsylvania) use this new analyzer.[6] EPA also provided for an extension of time to implement the program because of increased design and manufacturing time needed to produce this analyzer. This national policy was supported by EPA's technical reports. Relying on this policy and the EPA reports, defendants agreed in good faith to use the new EPA analyzer and began negotiations to modify the consent decree. Negotiations were progressing, agreement was reached with EPA and agreement with Delaware Valley collapsed in late April, 1981.

Defendants and Delaware Valley agreed on the new analyzer, but did not agree on the payment of funds to Delaware Valley to support the other programs of Delaware

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[6] In November, 1981, EPA filed a report with the district court stating that EPA granted an extension of time until January, 1983, to Memphis, Tennessee to use the computerized analyzer and that Massachusetts had requested an extension of time until April, 1983 to use the EPA analyzer.

Valley. The lower court has ignored the statement in *United States v. Swift and Company,* 286 U.S. 106, 76 L.Ed. 999, 52 S.Ct. 460 (1932), that a modification is appropriate when changing circumstances have turned the decree "into an instrument of wrong". *Swift,* 286 U.S. at 115. This is precisely what Delaware Valley has done. Their actions of agreeing in principle but requiring ransom is simply a course of conduct that no Court should condone.

On May 1, 1981, Delaware Valley requested the district court to find defendants in violation of the consent decree. On May 6, 1981 the district court scheduled a conference with all counsel to discuss the status of Defendants' motion to modify the consent decree to use the new analyzer and Delaware Valley's motion to find Defendants in violation. At that conference, defendants and Delaware Valley were requested to continue to seek an amicable resolution of this matter. Then, on May 20, 1981, without any evidentiary hearing or notice to any party, the district court suddenly issued its order finding Defendants in violation of the consent decree and denying Defendants' motion to postpone the implementation date of the program to January 1, 1983 in order to use the new EPA analyzer. Defendants were found in violation of the consent decree for attempting to comply with the requests solely initiated and urged by a plaintiff in this action—the Federal Government.

The consent decree in this case had one purpose—the implementation of federal law. For the district court to refuse modifications of that decree, which were clearly important to implement the policies of the federal agency charged with enforcement of the relevant federal law, was clearly an abuse of discretion which should be reviewed by this Court.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., May 20, 1981:

In 1976 and 1977, the Delaware Valley Citizens' Council for Clean Air ("DVCCCA") and the United States, respectively, each brought a civil action to compel the Commonwealth of Pennsylvania and two of its agencies to establish a program for the inspection and maintenance of

automobile emissions systems ("I/M program"), which the plaintiffs contended was required by federal law. *See* 42 U.S.C. §7410c-5(c)(1)(B). At length, the parties entered into a consent decree, approved by this Court on August 29, 1978, which provided for the establishment, either by legislation or regulation, of an I/M program in Pennsylvania. As subsequently modified, that decree provided that the Commonwealth would commence inspections on May 1, 1980.

Presently before the Court are two motions filed by the Commonwealth. The first motion seeks a modification of the consent decree to provide for a further postponement of the I/M program's full implementation until January 1, 1983. The Commonwealth's second motion seeks an order staying the implementation of the I/M program pending the Court's determination of the motion for a modification of the decree. Both motions will be denied.

The Commonwealth's principal ground for seeking the delay is that, by waiting the additional 20 months, a more advanced emissions system analyzer, using a computer, will be available for use in the I/M program. The new computer analyzer, which is more expensive, is not now available and, though presumably more accurate than the less expensive available analyzer, the degree of added accuracy is neither necessary nor required by the United States Environmental Protection Agency ("EPA"). All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting gas stations to buy, are adequate to fulfill the needs of the I/M program.

The parties submitted legal memoranda and a hearing was held on May 6, 1981, on the Commonwealth's

motions. In addition, the EPA, at the Court's request, submitted a brief report on the current air quality in the Philadelphia and Pittsburgh regions of the state. The report demonstrates that, while air quality in the two regions is improving or presently adequate in respect to some EPA standards, it continues to be wholly inadequate in respect to other EPA standards. For example, the ozone level in the Pittsburgh area not only fails to meet the standard, but has become worse over the past two years. In the Philadelphia area, the ozone level, while decreasing, is still at nearly twice the concentration permitted by the EPA standard. *See* EPA Report, Charts 1-5.

Therefore, upon consideration of the arguments of the parties and the EPA report, the Court has concluded that, notwithstanding the possible advantages of using the computer analyzer, the Commonwealth must establish the I/M program as set forth in the consent decree—*without further delay.*

Also before the Court is a motion filed by plaintiff DVCCCA requesting the Court to declare the defendants in violation of the consent decree, as modified, and to modify the consent decree. The modification sought would largely place supervision of the I/M program in the hands of the DVCCCA. Although the Commonwealth's delay in establishing the I/M program is disappointing and in large measure inexcusable, the Court does not believe that there are sufficient grounds at this time to either consider further or allow in whole or in part the drastic revision of the program proposed by the DVCCCA. Therefore, the motion of the DVCCCA will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

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and

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UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 20th day of May, 1981, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. The state defendants' motion for modification of the consent decree is *denied*.

2. The state defendants' motion to stay implementation of the consent decree is *denied*.

3. The motion of the Delaware Valley Citizens' Council for Clean Air to declare the defendants in violation of the consent decree, as modified, and to modify the

consent decree is *granted in part* and *denied in part:* (A) The motion is *granted* insofar as it seeks to have the defendants declared in violation of the consent decree, as modified, and the Court *so declares;* and, (B) the motion is *denied* insofar as it seeks a modification of the consent decree.

4. The state defendants are hereby *directed* to file with the Clerk of Court and serve, *on or before June 1, 1981,* a proposed plan for the Court's consideration, providing for the *immediate* implementation of the I/M program in accordance with the consent decree. Any *objections* thereto shall be filed with the Clerk of Court and served *on or before June 8, 1981.*

5. There will be a *hearing* on the state defendants' proposed plan, and any objections thereto, at *9:30 a.m., June 10, 1981,* in Courtroom *17B,* United States Courthouse, Philadelphia, Pa.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

Entered: 5-21-81
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.

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UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., June 16, 1981:

Presently before the Court is the Commonwealth's proposed Emission Inspection and Maintenance Plan, together with objections of the plaintiffs Delaware Valley Citizens' Council for Clean Air ("DVCCCA"), the United States of America and the Environmental Protection Agency ("EPA"), filed in response to the Court's Order of May 20, 1981. On May 20, the Court declared that defendants Commonwealth of Pennsylvania and the Secre-

taries of the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Department of Environmental Resources ("PennDER") were in violation of the Consent Decree in which defendants had agreed to establish an automobile emissions inspection and maintenance program ("I/M program") for the five-county Philadelphia and Pittsburgh areas to have commenced on May 1, 1981. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* Nos. 76-2068, 77-619 (E.D. Pa., May 20, 1981). On June 10, 1981, the Court held a hearing regarding the proposed plan. The Commonwealth's proposed emissions I/M program will be approved subject to the following modifications:

I. *Implementation of the Emissions I/M Program*

First, the Court approves the Commonwealth's proposal to use the BAR-80 emissions analyzer with an automatic data collection system. The BAR-80-ADC equipment is preferable to the BAR-74 equipment because of its superior increased cost efficiency and reporting accuracy, as well as its more certain adaptability to the testing of auto emissions for compliance with the new car warranty required by Section 207(b) of the Clean Air Act, 42 U.S.C. §7541(b).

Second, the Court believes that the I/M program can be fully implemented by May 1, 1982, through a sincere effort on the part of the Commonwealth and the cooperation of all parties involved.

The defendants have asserted in open court their sincere desire and interest in going forward with this program. Although certain of the plaintiffs challenge the

sincerity of these declarations, the Court believes that they have been made by the defendants responsibly and in good faith. If the Court is correct, the manner in which the defendants enter upon their obligations under this Order will soon be apparent and it is from there that it will be easily determined whether or not the Court's confidence and expectations have been well placed. The defendants surely have the resources, skill and the personnel to carry out what they say is their earnest goal. Time is the real test and, for purposes of this phase of this litigation, it commences at this time.

Third, defendants have informed the Court that 2,274 inspection facilities have already been certified under Phase I of the I/M program to date. Phase II of the certification process, which requires that each station purchase the approved emissions analyzer and hire a certified emissions mechanic, has yet to be completed. Since the Commonwealth has for some months been prepared for the training of certified emissions mechanics and the certification of new inspection stations, the Court finds that it is reasonable to require that the Commonwealth certify at least 3,000 inspection stations by the date of the implementation of this program—May 1, 1982.

II. *Program Quality Assurance*

Schedule B, §1(D) of the Consent Decree of August 30, 1978, requires that the Commonwealth and PennDOT commence the development and implementation of standards, procedures and regulations with respect to the "periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of

records." This provision was later modified to read that "periodic visits shall be unannounced and occur *at least* once every three (3) months for each inspection facility, unless the quality control procedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule." *Modification of Consent Decree,* March 7, 1980, sch. S. ¶1(D). Accordingly, ¶¶4, 6 and 8 require that the Commonwealth prepare a study for review by plaintiffs on the cost-effectiveness and quality of monthly on-site inspections, as opposed to the Commonwealth's proposed quarterly visitations. The aforementioned modifications to the Consent Decree specifically provide that "[p]laintiffs reserve the right to challenge any such procedures *which are not as effective* as the results of monthly on-site visits by the Commonwealth." *Modification of Consent Decree,* March 7, 1980, sch. B, ¶8 (emphasis added). On July 31, 1980, PennDOT submitted the required study of quality control procedures to the EPA. PennDOT proposed a system of quarterly visitations and audits of the inspection facilities. However, the EPA report on the Pennsylvania Proposed I/M Surveillance System, issued on September 23, 1980, outlined numerous deficiencies and inadequacies of the proposed surveillance system. EPA strongly recommended that the Commonwealth adopt a system of monthly audits, which in the opinion of the EPA would still remain cost-effective. In light of this report and the inadequacy of the quarterly visitations proposal demonstrated therein, this Court finds at this time that the proposed quarterly visitation program would not be "as effective as the results of monthly visits." Therefore, the Court will require defendants to implement a quality assurance program consisting of monthly audits and visitations of the

certified emissions I/M stations. Should it be demonstrated from the results of experience following full implementation of this program that actual events warrant a change in the program, alternative programs will be considered by the Court.

III. *Consumer Protection Mechanism*

The Consent Decree, as modified, states that defendants will "[s]ubmit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages *(i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT)*, or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees." *Modification of Consent Decree*, March 7, 1980, sch. B, ¶9 (emphasis added). The Commonwealth proposes to implement a consumer protection mechanism which involves a Central Complaint Office from which field investigators would investigate submitted complaints and possibly arrange vehicle emissions retesting or analyzer checks if deemed necessary. This Court believes, however, that it is extremely important that the I/M program be effective, which will include acquiring the confidence of citizens in the affected areas. Therefore, the Court finds that common sense dictates that the Commonwealth's proposed Central Complaint Office procedure would not rise to the level of "an equally effective alternative" as that of at least one official confirming inspection station in both the Philadelphia and Pittsburgh areas, as described in sch. B,

¶9 of the modified Consent Decree. The Court is simply convinced that, in the absence of demonstrable evidence to the contrary, a change in the originally envisioned mode is not warranted now. Therefore, the Court will require that the Commonwealth maintain at least one independent inspection facility in each of the Philadelphia and Pittsburgh areas as a base system for handling consumer complaints in those two widely separated areas. Should it be demonstrated at a later time that an alternative system would be just as effective in light of experience under the program, the Court will reconsider this matter.

IV. *Reporting Requirements*

Section 11 of the original Consent Decree requires that PennDOT submit specified quarterly reports to the plaintiffs "for the purpose of insuring compliance with this Consent Decree." *Consent Decree*, August 29, 1980, ¶11. PennDOT will still be required to provide these reports to plaintiffs. Such reports shall specifically outline the progress of defendants in implementing the I/M program.

Second, this Court will require that PennDOT submit progress reports to this Court on the first and fifteenth of every month hereafter or the first business day following such date if such date is a Saturday, Sunday or holiday, in order that the Court can effectively monitor the implementation of the approved I/M program. These reports will be required, *effective immediately*, and shall continue through December, 1981.

V. *Conclusion*

It has been almost three years from the date of the entry of the Consent Decree in which defendants agreed to implement an I/M program; yet we find that the Commonwealth has still failed to implement the agreed-to program. This program is vital to achieving federally established standards of air quality in the Philadelphia and Pittsburgh regions. The parties, by their consent in the current Decree, as well as their unanimous declaration in court that the program is to go forward, have acknowledged that the observance of these air quality standards are necessary to maintain the health and well-being of the residents in the Philadelphia and Pittsburgh areas. Since the Court anticipates the cooperation and best efforts of the Commonwealth and PennDOT in implementing this program, the Court will withhold a ruling at this time on plaintiffs' request for the imposition of sanctions for failure to comply with the approved program. An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 16th day of June, 1981, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. Defendants' motion for reconsideration of the Court's Order of May 20, 1981, is *denied* for the reasons stated by the Court at the June 10, 1981, hearing.

2. The Commonwealth's Proposed Emission Inspection and Maintenance Program I is *approved, except as modified* hereinafter by this Order.

3. Pursuant to sch. B, §§1(D), 4, 6 and 8 of the Modified Consent Decree of March 7, 1980, defendants shall promulgate and implement standards, procedures and regulations pertaining to monthly audits and monthly on-site visitations of the certified emissions inspection and maintenance stations. Monthly audits will be required until such time, following the full implementation of the I/M program, as the Court finds that experience under the program warrants a change.

4. Pursuant to sch. B, §9 of the Modified Consent Decree of March 7, 1980, defendants shall promulgate and implement standards, procedures and regulations pertaining to the establishment of official confirming inspection stations for consumer protection, at least one of which shall be in the Philadelphia area and one of which shall be in the Pittsburgh area, with establishment of additional facilities at the sole discretion of defendants. Such a consumer protection program will be required until such time, following the full implementation of the I/M program, as the Court finds that experience under the program warrants a change.

5. Pursuant to §11 of the Consent Decree of August 29, 1978, defendants shall submit specified quarterly reports to plaintiffs which set forth the state of progress in the Commonwealth's implementation of the I/M program.

6. Effective immediately and through December, 1981, defendants shall file progress reports with the Clerk of Court on the first and fifteenth of each and every month (or the first business day following such dates if such date is a Saturday, Sunday or holiday). Such reports

shall detail the progress of each of the items shown on defendants' submitted Emission Inspection Program I (Recommended Plan).

7. Subject to the Decree, previous Order of this Court and the within Order, the proposed schedule of defendants for the implementation of the I/M program is hereby *approved* and its operation *shall commence on May 1, 1982,* subject to such further Order of this Court as may from time to time be made.

8. Defendants shall certify a minimum of 3,000 inspection stations in order to effectively implement this program.

9. Subject to the expectations of the Court that its Orders to date, including the within Order, will be complied with by the defendants, the Court will withhold a final ruling on plaintiffs' request for impositions of sanctions at this time.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

Entered 6-17-81
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAR AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 14th day of July, 1981, IT IS ORDERED that defendants' motion for reconsideration of the Order of June 16, 1981, is hereby *denied*.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

Entered 7/17/81
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2303

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*; AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; QUINN, KEVIN; FARRELL, KAYSI; WEISS, RUTH G.; KLINKNER, JOHN; BIEZ, ELIZABETH S.; SHULMAN, MONA

v.

COMMONWEALTH OF PENNSYLVANIA; TRAIN, RUSSELL E., Individually and as Administrator of the Environmental Protection Agency, *et al.*; SHERLOCK WILLIAM T., Individually and as Secretary of the Pennsylvania Department of Transportation; GODDARD, MAURICE K., Individually and as Secretary of the Pennsylvania Department of Environmental Resources; SNYDER, DANIEL J., III, Individually and as Regional Administrator of the Environmental Protection Agency, Region III

(D.C. Civil No. 76-2068)

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

(D.C. Civil No. 77-0619)

Commonwealth of Pennsylvania, *et al.*,
Appellants

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued February 2, 1982

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*

(Opinion Filed March 1, 1982)

* * * * * * * * *

OPINION OF THE COURT

GARTH, *Circuit Judge.*

On August 29, 1978, after two years of litigation over the Commonwealth of Pennsylvania's alleged failure to comply with the Clean Air Act of 1970, 42 U.S.C. §§7401 *et seq.*, the Commonwealth and its Departments of Transportation and Environmental Resources consented to a decree in federal court. The two other parties to the decree were the Delaware Valley Citizens' Council for Clean Air and the United States. The decree provided for the establishment and implementation of a program for the inspection and maintenance of automobile emissions systems (the "I/M program") with the aim of reducing the level of carbon monoxide and ozone pollution in the Philadelphia and Pittsburgh areas. In this appeal, the Commonwealth challenges three orders entered by the district court which relate to that decree.

The first order, entered May 20, 1981, denied a request by the Commonwealth for a 20-month extension of the deadline for implementation of the I/M program and declared the Commonwealth to be in violation of the consent decree. The second order, filed June 16, 1981, modified the consent decree to require monthly state audits of emissions inspection stations, the establishment of two official "referee" stations to handle consumer complaints, and the certification by the Commonwealth of at least 3,000 inspection stations by May 1, 1982. The third order, filed July 14, 1981, refused a Commonwealth request for reconsideration of the June 16 order.

We note at the outset that the Environmental Protection Agency's State Implementation Plan for Pennsylvania originally called for the implementation of an I/M program by May 1, 1975. 40 C.F.R. §52.2038(d)(6)(1981). That implementation date was subsequently extended by the consent decree and modifications of that decree, first to August 1, 1980, then to May 1, 1981, and ultimately to May 1, 1982. Thus, by the time the I/M program is to be implemented, on May 1, 1982, the program will already be *seven years* behind schedule.

Our scope of review on this appeal is narrow: whether, in its orders modifying and refusing to modify the consent decree, the district court abused its discretion. Because we find no abuse of discretion by the district court in this case, we will affirm each of the three orders in question.

I.

In April, 1973, the Pennsylvania Department of Environmental Resources submitted to the EPA, in accordance with the Clean Air Act, a proposed plan for meeting federal ambient air quality standards for carbon monoxide and ozone. As modified and promulgated by the EPA in November, 1973, this plan included a provision calling for the implementation of an I/M program by May 1, 1975. 40 C.F.R. §52.2038 (1981).[1] The Commonwealth petitioned this court to review some aspects of the plan

[1] The Clean Air Act Amendments of 1977 subsequently established a requirement that states implement I/M programs in regional air basins where federal standards for either carbon monoxide or ozone could not be reached by December 31, 1982. 42 U.S.C. §7502(b)(11)(B). The Philadelphia and Pittsburgh regions are in this category.

promulgated by the EPA, but did not seek review of the I/M requirement or of the May 1, 1975 date for implementation of the I/M program. *Commonwealth of Pa. v. EPA*, 500 F.2d 246 (3d Cir. 1974).

More than a year after the Commonwealth had been required to implement its I/M program, the Commonwealth had not yet undertaken to meet its obligation and the EPA, for its part, had not undertaken its mandatory duty to enforce the Commonwealth's obligation under the plan. Accordingly, on June 29, 1976, the Delaware Valley Citizens' Council for Clean Air instituted a citizens' lawsuit, under 42 U.S.C. §7604, against the Commonwealth and the EPA. Subsequently, the EPA was dismissed as a defendant when it agreed to file its own complaint against the Commonwealth, and the two cases were consolidated.

Following prolonged discovery and negotiations the parties reached agreement on a consent decree which the district court approved on August 29, 1978. App. at 24. The consent decree called for the establishment and implementation of a program in which all gasoline powered motor vehicles weighing 11,000 pounds or less registered in ten counties in the Philadelphia and Pittsburgh areas[2] would be inspected annually for excessive pollutants in their exhaust. Owners of vehicles failing the emission tests would be required to have maintenance performed on their vehicles to reduce their discharge of pollutants. Op-

[2] The affected counties are Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties and Allegheny, Beaver, Butler, Washington, and Westmoreland Counties. Approximately 3.7 million vehicles would be subject to the I/M program. App. at 722.

eration of vehicles which were not in compliance with the I/M program would be prohibited, with fines assessed for violations. The I/M program was designed to achieve a substantial reduction in hydrocarbon and carbon monoxide exhaust emissions by December 31, 1987. By that time, it was projected that the exhaust levels would be 25 percent less than they would have been without the program.

The consent decree provided that the Pennsylvania Department of Transportation would first seek legislation instituting a "franchise" I/M system.[3] If the Pennsylvania legislature failed to enact such legislation by July 1, 1979, the Department of Transportation was to promulgate regulations providing for a "private garage" I/M system.[4] Consent Decree, Aug. 29, 1978, ¶4; App. at 30. The deadline for the implementation of the private garage system—the date when mandatory annual inspection of vehicles would begin—was originally set at August 1, 1980. *Id.* Sched. B, ¶7; App. at 46.

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[3] The consent decree defined the "franchise" system as

> an inspection/maintenance program in which the Commonwealth enters into a contract with a single person or entity to establish and operate the inspection aspects of the program for a geographic area or areas under the general administration of the Commonwealth and whereby the Commonwealth may also certify fleet operators, and motor vehicle dealers, who own, lease or operate at least 15 subject vehicles, to conduct inspections of subject vehicles owned, leased or operated by them.

Consent Decree, Aug. 29, 1978, ¶3(E); App. at 27-28.

[4] The consent decree defined the "private garage" system as "an inspection maintenance program in which the Commonwealth certifies a number of privately-owned facilities to perform the inspection of vehicles." *Id.* ¶3(D); App. at 27.

When the legislature failed to pass enabling legislation for a "franchise system," the Department of Transportation embarked upon the process of implementing the I/M program through the certification of "private garages." Presumably, "private garages" would be induced to obtain certification by the prospect of charging motorists for performing inspections and for any necessary resulting repairs. Certification would be conducted in two stages. In Phase I, garages would be certified as having adequate space, lighting, and equipment. In Phase II, the garages would have to obtain approved emissions analyzing equipment and hire a certified emissions inspector.

In late 1979 the Commonwealth requested and obtained agreement from Delaware Valley and the EPA to modify the original consent decree so as to delay implementation of the I/M program until May 1, 1981. This modification was approved by the district court on March 7, 1980. App. at 54. On February 1, 1981, just three months before the I/M program was scheduled to be implemented under the then-existing consent decree, the Commonwealth had still not published final regulations covering the vehicle emissions analyzing equipment which private garages would have to procure in order to become certified inspection stations. On February 6, 1981 the Commonwealth requested Delaware Valley and the EPA to consent to another modification of the consent agreement so as to delay the start of the I/M program until January 1, 1983. The need for the 20-month delay was to permit the Commonwealth to require the use of "computerized analyzer" testing equipment. This type of equipment had been recommended by the EPA for decentralized inspection programs such as the Commonwealth's, since

it offered greater accuracy and would therefore enhance public confidence in I/M programs. However, this computerized equipment had not yet been produced by any manufacturer, not even in prototype.

This request for modfication was the subject of negotiations among the parties but the parties failed to reach agreement and negotiations came to an impasse on April 28, 1981. On April 29, 1981 the Commonwealth filed a motion with the district court for a modification of the existing consent decree which would delay the start-up of the I/M program from May 1, 1981 to January 1, 1983. On May 1, 1981, Delaware Valley filed a motion to have the court hold the Commonwealth in violation of the consent decree's requirement that the Commonwealth implement the I/M program by May 1, 1981.

Following a court conference on May 6, 1981, the EPA, at the court's request, submitted a brief report on the current air quality in the Philadelphia and Pittsburgh areas. The report demonstrated that, while air quality in the two regions was improving or presently adequate in respect to some EPA standards, it continued to be inadequate in respect to other EPA standards. For example, the ozone level in the Pittsburgh area not only failed to meet the standard, but had become worse over the preceding two years. In the Philadelphia area, the ozone level, while decreasing, was still at nearly twice the concentration permitted by the EPA standard. *Id.* at 377. After receiving the EPA report, the district court issued its order of May 20, 1981 denying the Commonwealth's request for a modification of the consent decree which would extend the I/M program implementation date for another 20 months. The court also found the Common-

wealth in violation of the existing decree in that the Commonwealth had not complied with the May 1, 1981 deadline for I/M program implementation as specified in the decree. *Id.* at 385.

The May 20 order also directed the Commonwealth to submit "a proposed plan for the Court's consideration, providing for the *immediate* implementation of the I/M program in accordance with the Consent Decree." *Id.* at 389. The Commonwealth submitted its proposed plan on June 1 and Delaware Valley submitted comments on the plan on June 8.

The court heard oral argument on June 10 with respect to the Commonwealth's proposed I/M plan. In an order dated June 16, 1981, the court approved the Commonwealth's I/M plan, along with certain amendments which had been suggested by Delaware Valley's comments. In the order the court extended the deadline for implementation of the I/M program from May 1, 1981 to May 1, 1982, because the latter date was the earliest date by which the Commonwealth could complete its regulatory process and provide for the production of a sufficient number of emission analyzers to implement the I/M program. The court also modified the consent decree to require monthly state audits of emissions inspections stations, establishment of two official "referee" stations to handle consumer complaints, and certification of at least 3,000 inspection stations by May 1, 1982. *Id.* at 533. A motion by the Commonwealth for reconsideration of the June 16 order was denied on July 14, 1981. *Id.* at 714.[5]

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[5] After the record in this case was closed, we were informed that the Pennsylvania legislature by statute had prohibited the expenditure of public funds for the establishment of the I/M

II.

The authority of the district court to modify or refuse to modify the consent decree is defined in the decree itself. Paragraph 13 of the decree empowers the court, upon application by any party, to enter "such further orders and directions as may be necessary or appropriate for carrying out" the decree, or to modify or terminate any of the decree's provisions "upon a showing of changed circumstances and good cause."[6] This provision of the decree is merely declaratory of a district court's inherent power to modify a consent decree, even over the objection of one of the parties. *Jordan v. School Dist.*, 548 F.2d 117 (3d Cir. 1977). As Justice Cardozo wrote in *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932):

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent.

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program and that implementation of the program had ceased. The district court had thereupon, on January 22, 1982, held the Commonwealth in civil contempt. Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pa., No. 76-2068 (E.D. Pa. Jan. 22, 1982). This aspect of the controversy is not before us.

[6] Paragrah 13 of the consent decree provides:

> Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

App. at 35.

> . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act. . . . [I]n truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

(Citations omitted.) *Accord, System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 646-47 (1961); *Jordan, supra*, 548 F.2d at 120-22.[7]

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[7] In an analogous setting, Fed. R. Civ. P. 60(b) grants a district court discretionary authority to relieve a party from a judgment when "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5) or for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6).

In attacking the district court's orders modifying and refusing to modify the consent decree, the Commonwealth presents two arguments. First, the Commonwealth argues that the district court's actions with respect to the decree were procedurally flawed because the court did not hold a full hearing on the parties' contentions and declined to hear testimony from various witnesses that the Commonwealth had produced. Second, the Commonwealth argues that the court's orders, substantively, were improper.

On the question of procedure, this court held in *Mayberry v. Maroney (I)*, 529 F.2d 332 (3d Cir. 1976), that a district court must hold an evidentiary hearing before modifying a consent decree in such a manner as to remove requirements previously imposed. As Judge Gibbons wrote in his concurrence in *Mayberry I*, "Rule 60 (b) (6) confers no standardless residual discretionary power to set aside judgments on mere second thought." *Id.* at 337 (Gibbons, J., concurring). To say that an evidentiary hearing must be held before a court decides to *modify* a consent decree does not, however, imply that such a hearing is required before a court *refuses* to modify a consent decree. A consent decree is, after all, a judgment and is entitled to a presumption of finality. *See Mayberry v. Maroney (II)*, 558 F.2d 1159, 1163 (3d Cir. 1977). *Cf. Ackermann v. United States*, 340 U.S. 193, 198 (1950). ("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."). A court may thus be justified in rejecting, without affording an evidentiary hearing, a post-judgment attempt by a party to escape from obligations it had voluntarily assumed.

Neither is an evidentiary hearing required when a court modifies a consent decree in a substantive manner which is contemplated by the decree itself. Here, as discussed more fully below, the consent decree expressly provided for the possibility that the Commonwealth might have to conduct monthly audits of emissions inspection stations and might have to establish "referee" stations. In addition, the requirement that the Commonwealth make provision for some minimum number of stations to be certified, was necessarily implicit in the decree if the decree was to have any meaning or effect.

In this case, the Commonwealth's arguments were presented to the district court in various motion papers, at a conference held on May 6, 1981, and at a hearing on June 10, 1981. Given that, in its orders, the court did not increase the obligations to which the Commonwealth had already agreed when it signed the then-existing decree, we are satisfied that the court did not err in the manner in which it conducted the motion proceedings.

III.

With respect to the Commonwealth's challenges to the substance of the district court's orders at issue here, our scope of review is narrow. In reviewing the district court's orders, the issue is not whether the timetable or method of implementation sought by the Commonwealth was reasonable, or whether this court would have granted the Commonwealth's requests had the matter been initially before us. The issue, rather, is whether the district court properly exercised its discretion in deciding the matters presented to it.

A.

The District Court's Refusal to Extend the Compliance Deadline to January 1, 1983

In the context of motions for relief from judgments under Rule 60(b),[8] this court has observed that

> the standard for reopening a consent final judgment is a strict one. The Rule confers on district judges "[no] standardless residual discretionary power to set aside judgments. . . ." . . . Such relief is extraordinary and may be granted only upon a showing of exceptional circumstances. . . . We recognize, as well, that while consent decrees are judicial acts, they have often been recognized as having many of the attributes of a contract voluntarily undertaken. . . .And where, as here, the defendants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost.

Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1119-20 (3d Cir. 1979) (citations omitted), *cert. denied*, 444 U.S. 1026 (1980). The party seeking a modification of a consent decree

> must bear a heavy burden of showing circumstances so changed that "dangers, once substantial, have become attenuated to a shadow." *United States v.*

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[8] The standard for denial of a motion to modify a consent decree is the same as the standard for denial of a Rule 60(b) motion. International Bhd. of Teamsters, Local 249 v. Western Pa. Motor Carriers Ass'n, 660 F.2d 76, 85 n. 16 (3d Cir. 1981).

> *Swift & Co.*, 286 U.S. 106, 119 (1932), and that, absent such relief an "extreme" and "unexpected" hardship will result. *Id.* . . . [A] healthy respect for the finality of judgments demands no less.

Mayberry II, supra, 558 F.2d at 1163. *Accord, International Bhd. of Teamsters, Local 249 v. Western Pa. Motor Carriers Ass'n*, 660 F.2d 76, 85 (3d Cir. 1981); *United States Steel Corp. v. Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1274 (3d Cir. 1979).

The Commonwealth's April 29, 1981 motion to modify the consent decree was filed just two days before the I/M program had been scheduled to start under the then-existing decree. The sole reason advanced by the Commonwealth for seeking this modification was the Commonwealth's desire to specify computer analyzer emission testing equipment for its I/M program, instead of using the "BAR-80" analyzers then presently available.[9] In order to implement an I/M program with computer analyzers, the Commonwealth represented that an additional 20 months were needed because the desired computer analyzer testing equipment had not, as yet, been manufactured by any company, not even in prototype. The Commonwealth motion noted that an EPA policy statement of September 24, 1980 favored the use of computer analyzer testing equipment for decentralized I/M programs such as the program to be used in Pennsylvania.

As previously observed, the district court, at a conference of the parties held on May 6, 1981, considered

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[9] BAR-80 is the common designation for vehicle emission analyzers which meet the California Bureau of Automobile Repair 1980 specifications.

the Commonwealth's motions and requested an EPA report. After reviewing the report on May 20, the court denied the extension of time sought by the Commonwealth. The district court's opinion reveals that two factors underlay its decision not to grant the 20-month extension. First, as noted earlier, the EPA report had found that air quality in the Philadelphia and Pittsburgh areas continued to be substandard in some respects, and in one aspect had even gotten worse. At the time of the district court's order, the Commonwealth was already six years behind schedule in implementing the I/M program, and the court concluded that further delay would result in an undesirable postponement in attaining air quality standards. Although the Commonwealth argues that delaying implementation from May 1, 1982 (the date ultimately ordered by the Court) to January 1, 1983 would have only a small impact on air quality, its own calculations indicate that the district court's decision not to delay implementation further would result in a lowering of pollutant levels at an earlier date than would occur under the Commonwealth's proposal.[10]

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[10] Although the Commonwealth's calculations indicate that the ozone concentrations in the Philadelphia and Pittsburgh areas on January 1, 1984 would not differ significantly regardless of whether the I/M program were implemented on May 1, 1982 or January 1, 1983, these same calculations indicate that compliance with the national ozone standard as of January 1, 1983 would be advanced by an earlier I/M deadline. For example, under the "Rollback Model" used by the Commonwealth, ozone levels in the Pittsburgh area on January 1, 1983 would be only 3% above the national standard of .12 ppm (parts per million) if the I/M program were implemented on May 1, 1982, but would be 13% above the standard if implementation were delayed. (The figures generated by using the alternative "EKMA Model" would

Second, although the computerized analyzer favored by the Commonwealth might present certain advantages, the district court concluded that further delay of the I/M program was not warranted given that the existing analyzers were adequate, that the computerized analyzers were $1,000 to $2,000 more costly for private garages to purchase than the BAR-80 analyzers,[11] and—most important—that there was no assurance that on January 1, 1983 a sufficient number of computerized analyzers would be available. As the court noted:

> The new computer analyzer which is more expensive, is not now available and, though presumably more accurate than the less expensive available analyzer, the degree of accuracy is neither necessary nor required by the [EPA]. All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting gas stations to buy, are adequate to fulfill the needs of the I/M program.

App. at 386.

The Commonwealth has never represented that the computer analyzers it wishes to specify will be available to meet a January 1, 1983 implementation deadline. Thus, the Commonwealth's motion to modify the decree would

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be 14% and 23%.) In the Philadelphia area, ozone levels would exceed the national standard by 13% if implementation occurred on May 1, 1982, but would exceed the standard by 19% if implementation were postponed by an additional eight months. (The corresponding figures under the EKMA Model would be 28% and 33%.) *See* Appellant's Brief at 24 (Table I).

[11] *See* App. at 110. During oral argument the Commonwealth estimated the cost of a BAR-80 analyzer at $6,000. Tr. of Oral Argument at 24.

have delayed the I/M program by 20 months without any assurance that the program could be instituted even at that time in the form proposed by the Commonwealth. In this light, although, as the United States argues in its brief, the extension of time sought by the Commonwealth was not unreasonable, we cannot say that the district court abused its discretion in denying the extension.

B.

The District Court's Declaration That the Commonwealth Had Violated the Consent Decree

The Commonwealth does not dispute the fact that on May 20, 1981, when the district court found it in violation of the consent decree, it had failed to meet the May 1, 1981 deadline that then existed for the implementation of the I/M program. As of May 1, 1981 no inspection stations had been certified; indeed, none could have been because the Commonwealth had not yet published final regulations for the emissions analyzer equipment such stations would be required to use.

Despite this clear evidence of noncompliance with the consent decree, the Commonwealth contends that the district court should not have held it in violation of the decree because the Commonwealth had "diligently worked to modify the Consent Decree" and Delaware Valley had refused to consent to the Commonwealth's proposed modifications. Appellants' Brief at 30. As Delaware Valley noted in its brief, "Reduced to its essence, the Commonwealth argues that a defendant should be relieved of its liability under a judgment whenever the plaintiff refuses to modify the judgment." Delaware Valley Brief at 23.

The Commonwealth's argument is clearly untenable. While we do not pass on whether the Commonwealth acted in good faith in its response to the consent decree, it is obvious that a party to a binding judgment cannot comply with its terms by ignoring strictures placed upon it in the hope that they will disappear. As we stated in *Mayberry I, supra,* "The consent decree became the judgment of the court and the state officials were no more free to disregard its terms than are other litigants." 529 F.2d at 336 (citation omitted).

Had the Commonwealth sought both to comply in good faith with the decree and to employ the computerized analyzers, a request for modification of the decree could have been filed long before April 29, 1981. The record reveals that the Commonwealth knew *seven months* before the implementation deadline of May 1, 1981 that the EPA was recommending computerized analyzers and that the utilization of such equipment would require a postponement of the then-established I/M program implementation date. Furthermore, all plaintiffs had placed the Commonwealth on notice early in February, 1981, that they would expect compliance with the decree unless further modifications were ordered. The plaintiffs were under no obligation to agree to the Commonwealth's proposed modification and the Commonwealth, for its part, was always entirely free to apply to the district court for a modification. It delayed doing so, however, until April 29, 1981, only two days before the implementation deadline imposed by the decree.

Although the district court stated that "the Commonwealth's delay in establishing the I/M program is disappointing and in large measure inexcusable," App. at 387,

the court at that time denied Delaware Valley's request to set objective criteria by which to measure the Commonwealth's compliance with the decree and to provide for stipulated penalties. Thus, far from abusing its discretion in declaring the Commonwealth in violation of the decree, even though it found the Commonweatlh to have violated its judgment the court adopted a deferential and restrained approach in declining to impose sanctions against the Commonwealth.

C.

Requirement of Monthly Audits and "Referee" Stations

In requiring monthly, rather than quarterly, audits of inspection stations, and the establishment of two official "referee" inspection stations instead of relying on consumer complaint investigations, the district court imposed requirements specifically provided for in the consent decree. Each of the requirements was meant as a fallback position in case less costly measures favored by the Commonwealth did not prove equally effective.

1.

With respect to audits of the private garages participating in the I/M program, the consent decree provided that the Commonwealth would develop

> quality control procedures . . . including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records. Periodic visits shall be unannounced and occur at least once every three (3) months for each inspection facility, unless the quality control pro-

> cedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule.

Modified Consent Decree, Mar. 7, 1980, Sched. B, ¶1(D); App. at 56. Paragraphs 4 and 6 of the decree provided that the Commonwealth would "[c]ommence [a] study to determine . . . quality control procedures as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records." ¶4; App. at 58, and to "[s]ubmit [the] study of quality control procedures, including recommendations and supporting data, to plaintiffs for review and comment." ¶6; App. at 59. In paragraph 8, the plaintiffs "reserve[d] the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth." App. at 59.

On September 23, 1980, the EPA issued a memorandum in which it rejected the Commonwealth's proposal to audit inspection stations on a quarterly basis. The EPA concluded:

> Until [the Pennsylvania Department of Transportation] submits adequate information which shows that they have devised some other quality assurance program which is as effective as monthly audits, we feel that [the Department] must implement a system of monthly audits at all inspection stations.

In light of the EPA memorandum, Delaware Valley did challenge the Commonwealth's proposal for quarterly audits, pursuant to Schedule P, paragraph 8 of the consent decree, when Delaware Valley submitted its comments on the Commonwealth's June 1, 1981 proposal for implementation of the I/M program. *Id.* at 469.

The district court, noting that the EPA report had "outlined numerous deficiencies and inadequacies of the proposed surveillance system" and that "EPA strongly recommended that the Commonwealth adopt a system of monthly audits, which in the opinion of the EPA would still remain cost-effective," concluded that "the proposed quarterly visitation program would not be 'as effective as the results of monthly visits.'" *Id.* at 536. The court thus required the Commonwealth to institute monthly audits of the private garages participating in the I/M program. In view of Schedule B, paragraph 8 of the decree, which left open the possibility that monthly audits would be required if the Commonwealth's alternative procedures were "not as effective as the results of monthly on-site visits," and the EPA report indicating the deficiencies of the Commonwealth's proposal, the district court's action was not an abuse of discretion.

2.

With respect to the establishment of "referee" stations,[12] Schedule B, paragraph 9 of the consent decree required the Commonwealth to adopt

> policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at

[12] The purpose of "referee" stations was to provide a neutral state-run testing facility in the event a dispute arose with the private garage as to the inspection results.

> the sole discretion of [the Pennsylvania Department of Transportation], or an equally effective alternative, such as timely consumer compl[ai]nt investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question.

Id. at 60. After considering Delaware Valley's objection that the Commonwealth consumer complaint proposal would be inadequate, the district court concluded:

> [C]ommon sense dictates that the Commonwealth's proposed Central Complaint Office procedure would not rise to the level of "an equally effective alternative" as that of at least one official confirming inspection station in both the Philadelphia and Pittsburgh areas, as described in Sch. B, ¶9 of the modified Consent Decree.

Id. at 537.

As the district court observed in its opinion, the establishment of "referee" stations was "the originally envisioned mode" of ensuring the accuracy of the inspections performed by the private garages. *Id.* at 538. Alternative procedures were permissible only if they were "equally effective." The district court concluded that the alternative proposed by the Commonwealth would not be equally as effective as the establishment of "referee" stations. We hold that the court did not abuse its discretion in thereby requiring that "referee" stations be established.

D.

Certification of 3,000 Stations

The district court in its June 16, 1981 order, required the Commonwealth to certify at least 3,000 inspection stations by May 1, 1982. The Commonwealth argues that this was an abuse of discretion because there was no such requirement in the consent decree and because the Commonwealth had no way of ensuring compliance with the requirement since it has no power or authority to mandate that private garages purchase the emissions analyzers and hire the inspectors necessary to obtain Phase II certification.

At oral argument, the Commonwealth indicated that its objection was not to the *number* of stations mandated —indeed, the Commonwealth itself had contemplated the establishment of 8,700 stations, nearly three times the number required by the district court[13]—but to the fact that the court required the certification of *any* stations. The Commonwealth's position was that it would have been an abuse of discretion for the court to have mandated the certification of even *one station*. Tr. of Oral Argument at 8. In the Commonwealth's view, the consent decree did not require it to establish a network of inspection stations, but merely to set up a system which private stations could volunteer to join. *Id.* at 14. And if too few or even no stations, chose to participate, then—in an argument reminiscent of its earlier apology for noncompliance with the May 1, 1981 implementation deadline—the Commonwealth would treat the decree as inoperative and seek to modify it. *Id.* at 13, 18-19, 21-22, 43.

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[13] *See* App. at 559.

We reject this argument in its entirety. The Commonwealth in effect is asserting that the consent decree into which it entered imposed *no* real obligation on it to ensure that vehicle inspections took place and that pollutant emissions were reduced.[14] We agree with Dela-

[14] As the Commonwealth stated at oral argument:

MR. HRUBOVCAK: . . . [N]o stations have been certified through Phase 2 or purchased the required piece of equipment.

THE COURT: Well, now, let's assume that none ever do and you come back to Judge Bechtle and ask for a modification of the decree.

What will the Commonwealth's position be? Will it be that the decree finds them to do something about the problem or that, well, this settlement failed; let's try the lawsuit?

MR. HRUBOVCAK: Well, Your Honor, I really can't speculate as—

THE COURT: I have to speculate.

MR. HRUBOVCAK: Okay. The basis for your speculation is that no stations have applied for a Phase 2 certification, and, therefore, no cars can be inspected at the required date; is that the ground rules, Your Honor?

THE COURT: Yes. What happens then? Does the decree bind the Commonwealth to do anything at all?

MR. HRUBOVCAK: No, Your Honor. *The decree, as I read it, would not bind the Commonwealth at all.* That might be—

THE COURT: That leaves the case in the posture then that the plaintiffs would say, "All right. If the Commonwealth isn't bound, let's go back and try the lawsuit."

MR. HRUBOVCAK: That will be one possibility.

THE COURT: Yes.

MR. HRUBOVCAK: Your Honor—

THE COURT: And that is not a very attractive construction of a final judgment that's been in place for a number of years.

Tr. of Oral Argument at 21-22 (emphasis added).

ware Valley that "[s]uch an argument would make a mockery of the Consent Decree and would work a cruel hoax on the court." Delaware Valley Brief at 31.

Although the requirement that a certain number of inspection stations be certified is not explicitly set forth in the decree, it is necessarily implicit in it. To hold otherwise would turn the decree into an empty promise. When it signed the decree, the Commonwealth must have known that the attainment of the decree's objectives would require a certain minimum number of inspection stations to be established, and that it was the Commonwealth's duty under the decree to see that this was done. *See Mayberry I, supra,* 529 F.2d at 337 (Gibbons, J., concurring). We are unwilling to believe that the Commonwealth negotiated and signed the decree regarding it from the start as a meaningless document, a farce.

It is true that the Commonwealth cannot force privately-owned garages to articipate in the I/M program, but this argument is basically a distraction. It was always contemplated that the I/M program would be structured such that there would be an economic incentive for private garages to participate. In fact, at the time of the court's order, some 2,274 garages had already applied for the program and had achieved Phase I certification. App. at 535.

We have no reason to believe that if the Commonwealth set about implementing the I/M program in good faith, the goal of 3,000 certified stations could not be met. But even if the number of initially volunteering garages fell short of the number necessary to operate the I/M program adequately, this would not be grounds—as the Commonwealth seems to suggest—for scrapping the decree. The Commonwealth always retains the option to estab-

lish its own inspection stations if a shortage of inspection facilities develops. We thus hold that the district court did not abuse its discretion in requiring the Commonwealth to certify 3,000 inspection stations by May 1, 1982.

IV.

In short, the Commonwealth agreed to establish an I/M program and obligated itself to achieve particular goals by particular dates. We are not persuaded that its commitment, judicially decreed since August 29, 1978, was illusory. Accordingly, since we have concluded that the district court properly exercised its discretion, the orders appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2303

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.;* AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; QUINN, KEVIN; FARRELL, KAYSI; WEISS, RUTH G.; KLINKNER, JOHN; BIEZ, ELIZABETH S.; SHULMAN, MONA

v.

COMMONWEALTH OF PENNSYLVANIA; TRAIN, RUSSELL E., Individually and as Administrator of the Environmental Protection Agency, *et al.;* SHERLOCK, WILLIAM T., Individually and as Secretary of the Pennsylvania Department of Transportation; GODDARD, MAURICE K., Individually and as Secretary of the Pennsylvania Department of Environmental Resources; SNYDER, DANIEL J., III, Individually and as Regional Administrator of the Environmental Protection Agency; Region III

(D. C. Civil No. 76-2068)

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA; the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

(D. C. Civil No. 77-0619)

Commonwealth of Pennsylvania, *et al.*,

Appellants

Present: Aldisert, Gibbons, Hunter, Weis, Garth, Sloviter and Becker, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellants, Commonwealth of Pennsylvania, et al. in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges or the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

(s) Garth

Judge

Dated: March 26, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

CONSENT DECREE

WHEREAS, the United States Environmental Protection Agency (hereinafter "EPA") promulgated a transportation control plan for the Metropolitan Philadelphia and Southwest Pennsylvania Air Quality Control Regions on November 28, 1973 for the purpose of attaining the primary health-related ambient air quality standards for photochemical oxidants and carbon monoxide in the two regions;

WHEREAS, said transportation control plan included the requirement that the Commonwealth of Pennsylvania establish a mandatory inspection/maintenance program for light-duty and medium-duty vehicles in the two regions, 40 CFR Section 52.2038;

WHEREAS, Plaintiff Delaware Valley Citizens' Council for Clean Air, and other Plaintiffs, both organizational and individual, instituted Civil Action No. 76-2068 against the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation (hereinafter "PennDOT") the Secretary of the Pennsylvania Department of Environmental Resources (hereinafter "PennDER"), the Administrator and Regional Administrator of EPA to enforce the inspection/maintenance regulation, under the authority of the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.*, on June 29, 1976;

WHEREAS, EPA issued Notices of Violation to the Governor of Pennsylvania and the Secretary of PennDOT on September 23, 1976, under the authority of Section 113(a)(1) of the Clean Air Act, as amended 42 U.S.C. 7413(a)(1), for their failure to implement the inspection/maintenance regulation;

WHEREAS, Plaintiff United States instituted Civil Action No. 77-619 against the Commonwealth of Pennsylvania and certain of its departments and officers on February 18, 1977 under the authority of Section 113(b) of the Clean Air Act, as amended, 42 U.S.C. 7413(b);

WHEREAS, pursuant to a Stipulation entered into by the Plaintiffs in Civil Action No. 76-2068 and EPA on February 16, 1977, EPA was dismissed as a Defendant in that action upon the filing of Civil Action No. 77-619;

WHEREAS, extensive pre-trial motions and discovery proceedings have taken place in these actions, including oral argument of summary judgment motions by all parties on July 21, 1977, several sets of written interrogatories, and oral depositions of 14 employees of the Commonwealth of Pennsylvania;

WHEREAS, the parties agree that the entry of this Consent Decree is the most beneficial means to resolve this litigation;

WHEREAS, this Consent Decree is entered without the adjudication of any issues of fact or law.

NOW THEREFORE, before the taking of any testimony upon the pleadings and upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED:

1. This Court has jurisdiction of the subject matter of these actions and of the parties hereto.

2. The provisions of this Consent Decree apply to the Defendants Commonwealth of Pennsylvania, Secretary of PennDOT and the Secretary of PennDER, to all Plaintiffs and to each of the officers, agents, employees and successors of said parties.

3. The following definitions apply to this Consent Decree:

A. Inspection—the testing of the exhaust emissions of a vehicle by means of the insertion of a probe of an emission analyzer or similar instrument into the tailpipe of the vehicle while its engine is operating.

B. Maintenance—the repair or adjustment of a vehicle in order to reduce the level of its exhaust emissions below exhaust emission standards prescribed by the Commonwealth.

C. Inspection/maintenance program—a program to reduce subject vehicle exhaust emissions by annually identifying vehicles that require maintenance and requiring that such maintenance be performed.

D. Private garage system—an inspection/maintenance program in which the Commonwealth certifies a number of privately-owned facilities to perform the inspection of vehicles.

E. Franchise system—an inspection/maintenance program in which the Commonwealth enters into a contract with a single person or entity to establish and operate the inspection aspects of the program for a geographic area or areas under the general administration of the Commonwealth and whereby the Commonwealth may also certify fleet operators, and motor vehicle dealers, who own, lease or operate at least 15 subject vehicles, to conduct inspections of subject vehicles owned, leased or operated by them

F. Philadelphia Area—Philadelphia, Bucks, Montgomery, Chester and Delaware Counties.

G. Pittsburgh Area—Allegheny, Beaver, Butler, Westmoreland and Washington Counties.

H. Light-duty motor vehicle—a gasoline powered 4-wheel motor vehicle rated at 7,000 pounds gross vehicle weight (GVW) or less which is commonly used on public roads or highways.

I. Medium-duty motor vehicle—a gasoline powered motor vehicle rated at more than 7,000 pounds GVW and no more than 11,000 pounds GVW which is commonly used on public roads or highways.

J. Subject Vehicle—each light-duty or medium-duty motor vehicle registered in the Philadelphia or Pittsburgh area except an antique or classic vehicle as presently defined in the Pennsylvania Vehicle Code, or any other vehicle that the Commonwealth determines is rarely used on the public roads or highways.

K. Inspector—a person authorized by the Commonwealth to perform inspections on subject vehicles.

L. Inspection facility—a place of business authorized by the Commonwealth to perform inspections on subject vehicles.

M. Exhaust emission standard—the level of exhaust emissions, prescribed by the Commonwealth, which separates subject vehicles requiring maintenance from those that do not.

N. Stringency Factor—a measure of the rigor of an inspection/maintenance program based on the estimated percentage of all subject vehicles whose exhaust emissions would exceed the exhaust emission standards for carbon monoxide and/or hydrocarbons prior to the performance of maintenance.

O. Single Sticker System—a system in which one inspection sticker is issued which does not, in any way, distinguish between compliance with the inspection/maintenance program and the inspection program presently in operation in the Commonwealth.

P. Double Sticker System—any system in which the inspection program sticker or stickers issued distinguish between compliance with the inspection/maintenance program and the inspection program presently in operation in the Commonwealth.

4. Because the Commonwealth seeks to secure the enactment by the Pennsylvania General Assembly of enabling legislation for a franchise system, PennDOT shall have until July 1, 1979 to use its best efforts to obtain such legislation. Defendant PennDOT shall further perform those other activities related to the establishment of an inspection/maintenance program which are listed in paragraphs 1 through 3 of the attached Schedule A and paragraph 1 of the attached Schedule B, which are annexed hereto and incorporated by reference into this Consent Decree, by the dates provided therein. If such legislation is not enacted by July 1, 1979, Defendant PennDOT shall immediately proceed toward implementation of a private garage system in accordance with paragraphs 2 through 8 of Schedule B pursuant to, inter alia, 75 P.S. §4701 et seq. However, on or before July 1, 1979, the parties may agree to extend this date to a date no later than October 1, 1979. If such an extension is granted and franchise legislation is not enacted within the extended time period, the dates specified in paragraphs 2 through 6 of Schedule B shall be extended by the same time period as such extension, and the dates specified in paragraphs 7 and 8 of Schedule B will be extended by three months.

5. If enabling legislation for a franchise system is enacted within the time period (or any extension thereof) specified in paragraph 4 above, Defendant PennDOT shall

immediately proceed toward implementation of a franchise system in accordance with the schedule set forth in paragraphs 4 through 10 of Schedule A. If such legislation is enacted, Defendant PennDOT shall not be required to comply with any portion of Schedule B (except as provided in paragraph 4 above).

6. The Executive Branch of the government of the Commonwealth of Pennsylvania shall not reduce below an operating level the funds for the inspection/maintenance program because of any reductions in funds appropriated to PennDOT.

7. Defendants shall establish exhaust emission standards for the inspection/maintenance program which shall result in at least a twenty-five per cent (25%) reduction in both hydrocarbon and carbon monoxide exhaust emissions by December 31, 1987, compared to the level of exhaust emissions that would exist on that date without the program; provided, that in no case will a stringency factor greater than twenty-five per cent (25%) be required if the inspection/maintenance program is implemented in accordance with the time periods specified in this Consent Decree. Should Defendants fail to establish the mandatory inspection/mandatory maintenance phase of the program on the dates specified in the applicable attached compliance schedule, Plaintiffs may seek modification of such stringency factor in order to achieve the above-referenced twenty-five per cent (25%) exhaust emissions reduction. In the event that the carbon monoxide or the photochemical oxidant primary ambient air quality standard is attained in the Philadelphia or the Pittsburgh area, the required reduction in the related exhaust emissions may be reduced in such area to a level which will at a minimum maintain such standard.

8. Defendant Commonwealth of Pennsylvania will pay, within thirty days of the entry of this Decree, reasonable counsel fees and costs to Plaintiffs' counsel in Civil Action No. 76-2068, the Public Interest Law Center of Philadelphia, in the amount of $30,000.00, which is a full, final and complete settlement of all counsel fees, costs and any other expenses.

9. The United States and the Public Interest Law Center of Philadelphia, counsel for Plaintiffs in Civil Action No. 76-2068, will reach final agreement on the attorneys' fees question within two weeks of the entry of this decree.

10. In order to defray a portion of the start-up costs of the inspection/maintenance program, EPA hereby agrees to award a grant of $400,000.00 to PennDOT. PennDOT agrees that it shall submit no later than ninety days prior to the date upon which expenditures of funds are to be made, a full and complete grant statement (on a form to be supplied by EPA) which shall include, but not be limited to, a work plan, budget, and a statement of federal and non-federal funds to be used for the project. EPA's review of said grant statement shall be limited to insuring its completeness, insuring that moneys listed are to solely be used for inspection/maintenance start-up costs, and insuring that the payment and expenditures of funds will be made in accordance with all applicable Federal laws and regulations. The parties agree that payment shall be made in accordance with a payment schedule which shall be included in the grant award document. Nothing contained herein shall preclude the Commonwealth from requesting or being considered for additional funding for inspection/maintenance efforts; pro-

vided, however, that compliance with the terms of this Consent Decree shall not be conditioned upon the award of any such future funding.

11. For the purpose of insuring compliance with this Consent Decree, PennDOT shall submit reports to the parties listed in paragraph 14 describing all actions (including the status of franchise legislation) taken toward compliance with this Decree, beginning with a report postmarked no later than January 1, 1979 and continuing every three months thereafter until the commencement of mandatory inspection and voluntary maintenance, and a report every six months thereafter until the end of the first year of mandatory inspection and mandatory maintenance. Commencing with a report postmarked no later than ninety days following completion of the first year of mandatory inspection and mandatory maintenance and continuing every year thereafter, Defendant PennDOT shall submit reports for the previous year which include at least the following:

(a) The number of subject vehicles inspected in the inspection/maintenance program;

(b) The number of such subject vehicles whose exhaust emissions initially exceeded the exhaust emission standards for carbon monoxide and/or hydrocarbons, in total and by pollutant;

(c) The number of inspection stickers issued to subject vehicles and the number of subject vehicles registered.

12. The Commonwealth shall be allowed to institute a waiver of maintenance program, based on the establishment of maximum maintenance costs for certain

subject vehicles, pursuant to regulations to be enacted by the Commonwealth. The Commonwealth shall make available to Plaintiffs evidence demonstrating the effect of such program. However, Plaintiffs will have the right to challenge any unreasonable waiver provision.

13. Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

14. All reports and other information that must be submitted to Plaintiffs in satisfaction of a requirement of this Consent Decree shall be sent to:

United States Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

Attention: Director, Enforcement Division (3EN00)
United States Environmental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460

Attention: Director, Mobile Source Enforcement Division (EN-340)
United States Department of Justice
Land and National Resources Division
Washington, D.C. 20530

Attention: Chief, Pollution Control Section
Albert Slap, Esquire
Public Interest Law Center
1315 Walnut Street, 16th Floor
Philadelphia, Pennsylvania 19107

(Signatures appear on next page)

We hereby agree to the entry of the foregoing Consent Decree.

(s) Sanford Sagalkin
Sanford Sagalkin
Acting Assistant Attorney
General, Land and Natural
Resources Division

(s) Peter F. Vaira
Peter F. Vaira
United States Attorney
Philadelphia, Pennsylvania

(s) Thomas A. Pursley, III
Thomas A. Pursley, III
Attorney for United States
Department of Justice

(s) Robert S. Forster, Jr.
Robert S. Forster, Jr.
Assistant United States
Attorney, Philadelphia,
Pennsylvania

(s) Jack J. Schramm
Jack J. Schramm
Regional Administrator
United States Environmental
Protection Agency, Region III

(s) Albert J. Slap
Albert J. Slap
Public Interest Law Center
of Philadelphia, Counsel for
Plaintiffs in C.A. 76-2068

(s) John Hrubovcak
John Hrubovcak, Counsel for
Pennsylvania Department of
Transportation

(s) Keith Welks
Keith Welks, Counsel for
Pennsylvania, Department of
Environmental Resources

(s) B. R. Jackson
Benjamin R. Jackson
Acting Deputy Assistant
Administrator for Mobile Source
and Noise Enforcement, United
States Environmental Protection
Agency

So Ordered this 29th day of August, 1978.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*

SCHEDULE A

To the extent Schedule A is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a franchise inspection/maintenance program:

1. *September 15, 1978.* Submit to Plaintiffs a current copy of the legislation which Defendants intend to introduce in the Pennsylvania General Assembly.

2. *October 1, 1978.*

(A) Introduce legislation in the Pennsylvania General Assembly and submit a copy of such legislation to Plaintiffs.

(B) Commence development work on a Request for Proposals to establish an inspection/maintenance program in the Philadelphia and Pittsburgh areas.

(C) Commence development of standards, procedures, and regulations for the inspection/maintenance program, including:

(1) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

(2) The requirement that, commencing twenty-one months after enactment of legislation, all subject vehicles be inspected once each year (but need not be maintained during the initial year) and in addition, commencing thirty-three months after enactment of legislation, that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 2 (C) (1) of this schedule, be maintained and reinspected. If a single sticker system or a denial of registration enforcement mechanism is used by the Commonwealth, such maintenance and re-

inspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

(3) Enforcement procedures applicable to owners of subject vehicles effective no later than twenty-one months after enactment of legislation, including at a minimum: (a) denial of registration by the Commonwealth to any subject vehicle which does not meet the requirements of paragraph 2(C)(2) of this schedule or an equally effective enforcement mechanism, such as the denial of a valid sticker signifying compliance with the inspection/maintenance program; (b) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 2(C)(2) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(4) If the Commonwealth authorizes inspections by fleet operators and motor vehicle dealers, the following shall also be developed:

(A) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(B) The requirements for the certification of such fleet operators and motor vehicle dealers as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(C) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

3. *July 1, 1979.* Submit to Plaintiffs a draft copy of the Request for Proposals.

4. *Two months after the enactment of legislation.* Issue to potential contractors the Request for Proposals and submit this document to Plaintiffs.

5. *Five months after the enactment of legislation.* Submit to Plaintiffs a copy of the proposal selected by the Commonwealth for implementation of the inspection/maintenance program.

6. *Six months after the enactment of legislation.*

(A) Submit to Plaintiffs a copy of the signed contract between the Commonwealth and the contractor. This contract shall, among other things, require the contractor to make the inspection records available to the Commonwealth, require the contractor to perform instrument calibration checks and allow the Commonwealth to inspect the premises of the contractor.

(B) Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs those regulations and other standards and procedures, for the inspection/maintenance program which, at a minimum, include the provisions listed in paragraph 2(C) of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

7. *Eight months after enactment of legislation.* Adopt, and submit to Plaintiffs, final standards, procedures, and regulations for the inspection/maintenance program, which, at a minimum, include the provisions listed in paragraph 2(C) of this schedule.

8. *Fifteen months after enactment of legislation.*

(A) Commence a program to train automobile repair mechanics in the requirements of the inspection/maintenance program and the proper means of maintaining and repairing vehicles to meet such program requirements.

(B) Commence a program to inform the public and the automotive repair industry of the inspection/maintenance program.

9. *Twenty-one months after enactment of legislation.* Commence mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected at least once by the end of the 32nd month after the enactment of legislation.

10. *Thirty-three months after enactment of legislaton.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program. If a single sticker system or a denial of registration enforcement mechanism is used by the Commonwealth, such maintenance and re-inspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

SCHEDULE B

To the exent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a private garage inspection/maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject ve-

hicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by January 31, 1981; and in addition, that commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1 (A) of this schedule be maintained and re-inspected prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any subject vehicle which does not meet the requirements of paragraph 1 (B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1 (B) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records, adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other standards and procedures, for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

A. Adopt, and submit to Plaintiffs, standards, procedures, and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *November 1, 1979.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted standards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

5. *February 1, 1980.* Commence a program to inform the public of the inspection/maintenance program.

6. *July 1, 1980.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees. These

employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by February 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

7. *August 1, 1980.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by January 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

8. *February 1, 1981.* Commence the periods of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

MODIFICATION OF CONSENT DECREE

WHEREAS, a Consent Decree was entered on August 30, 1978, as the most beneficial means to resolve this litigation; and

WHEREAS, all parties agree that modifications are necessary to the Consent Decree in order to assure timely implementation of an effective inspection/maintenance program in affected areas of the Commonwealth.

NOW THEREFORE, upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED that the August 30, 1978 Consent Decree shall be modified as follows:

"SHEDULE B

To the extent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDot shall implement the following schedule for a private garage inspection/ maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/ maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by January 31, 1981; and in addition, that commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1 (A) of this schedule be maintained and re-inspected prior to the expiration of the inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any subject vehicle which does not meet the requirements of

paragraph 1 (B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1 (B) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records. Periodic visits shall be unannounced and occur at least once every three (3) months for each inspection facility, unless the quality control procedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and re-inspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other standards and procedures, for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

(A) Adopt, and submit to Plaintiffs, standards, procedures and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *February 1, 1980.* Commence study to determine the quality control procedures as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records. Such study shall consider the cost-effectiveness of the quality control procedures and include recommendations as to the frequency of periodic on-site visits and whether they should be supplemented by random on-site visits. Such study shall also examine the quality control programs recommended or used in other states with operating or proposed private garage systems.

5. *May 1, 1980.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted standards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

6. *August 1, 1980.* Submit study of quality control procedures, including recommendations and supporting data, to Plaintiffs for review and comment. Submit the Commonwealth's proposed modifications, if any, of the procedures adopted pursuant to paragraph 1 (D) of this schedule.

7. *November 1, 1980.* Commence a program to inform the public of the inspection/maintenance program. A detailed outline of this program shall be submitted to Plaintiffs by October 1, 1980.

8. *December 1, 1980.* Submit to Plaintiffs final modifications, if any, of the procedures adopted pursuant to paragraph 1 (D) of this schedule. Plaintiffs reserve the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth.

9. *January 1, 1981.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of

other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer compliant investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by November 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

10. *May 1, 1981.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by October 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

11. *November 1, 1981.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

12. *January 1, 1982.* Submit a report evaluating the effectiveness of the quality control procedures of the I/M program. Such report shall include a summary of the exhaust emission analyzer calibration data obtained by Defendant PennDOT from the on-site visits of official inspection stations and from the calibration reports submitted by the stations to Defendant PennDOT.

13. *January 1, 1983.* Submit a second report evaluating the effectiveness of the quality control procedures of the I/M program, as set forth in the preceding paragraph."

We hereby agree to the entry of the foregoing Modification of Consent Decree.

(s) James W. Moorman
James W. Moorman
Attistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

(s) Peter F. Vaira
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(s) Benjamin R. Jackson
Deputy Assistant
Benjamin R. Jackson
Administrator for Mobile Source and
Noise Enforcement,
U.S. Environmental Protection Agency

(s) Jerome Balter
Jerome Balter
Public Interest Law
Center of Philadelphia

So Ordered this 7th day of March, 1980.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*

Office - Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS
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No. 81-2331

IN THE

Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR, et al.

and

UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS COUNCIL, ET AL.

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COUNTER-STATEMENT OF PETITIONERS' QUESTIONS

1. Whether the district court abused its discretion in denying the defendants' motion to modify the consent decree.

2. Whether the district court abused its discretion in declaring the defendants to be in violation of the consent decree.

3. Whether the district court's denial of an evidentiary hearing was in conflict with *Hughes v. United States*, 342 U. S. 353 (1952).

4. Whether the district court abused its discretion in requiring defendants to certify a minimum of 3,000 inspection stations.

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No. 81-2331

IN THE

Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS COUNCIL
FOR CLEAN AIR, et al.

and

UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS COUNCIL, et al.

Respondents, the Delaware Valley Citizens Council for Clean Air, et al. respectfully request the Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit reported at 674 F. 2d 976 (3rd Cir., March 1, 1982). The defendants' petition for rehearing was denied March 26, 1982.

COUNTER-STATEMENT OF THE CASE

In accord with the provisions of the Clean Air Act of 1970[1] the defendants submitted a State Implementation Plan (SIP) for attaining compliance with the national ambient air quality standards, 42 U. S. C. § 7410. The defendants' proposed SIP for attaining compliance with the standards for carbon monoxide and ozone voluntarily included a Transportation Control Plan which would reduce emissions of carbon monoxide and ozone-forming hydrocarbons from mobile pollution sources and, as part of this Transportation Control Plan, the defendants opted to implement an auto emission inspection and maintenance (I/M) program).[2]

On the basis of defendants' proposed SIP the Administrator of the United States Environmental Protection Agency ("EPA") promulgated the Pennsylvania SIP in 38 Fed. Reg. 32884 (11/28/73), 40 CFR 52.2037, et seq. The promulgated SIP included an I/M program, somewhat revised from the defendants' proposal, 40 CFR 52.2038 and established May 1, 1975 as the date for I/M program implementation, 40 CFR 52.2038(d)(6).[3]

In June 1976, more than one year after the I/M program had been scheduled to start, the state had not yet

1. When enacted in 1970 the Clean Air Act was codified at 42 U. S. C. § 1857, et seq. With passage of the 1977 Amendments the Act was recodified at 42 U. S. C. § 7401, et seq. All references to the Clean Air Act are based on the post 1977 recodification.

2. Under the Clean Air Act of 1970 the inclusion of an I/M program in a state SIP was optional with the state. Under the Clean Air Act Amendments of 1977 the inclusion of an I/M program was mandatory for Pennsylvania and other states which could not attain carbon monoxide or ozone standards by December 31, 1982.

3. Pennsylvania petitioned for review of some aspects of the EPA promulgated SIP but did not seek review of the I/M program requirement or the I/M implementation date. *Commonwealth of Pennsylvania v. Environmental Protection Agency*, 500 F. 2d 246 (3rd Cir. 1974).

undertaken to implement the I/M program nor had the EPA taken any action to enforce the obligation. Accordingly the Delaware Valley Citizens Council for Clean Air, et al. ("Delaware Valley") filed an action against the EPA for failure to enforce the I/M program requirement and against the state defendants (the Commonwealth of Pennsylvania, the Pennsylvania Secretary of Environmental Resources and the Pennsylvania Secretary of Transportation) for violation of the I/M program requirement in the state SIP. Subsequently, the EPA decided to bring an enforcement action against the state defendants and the two actions were consolidated.

Following lengthy discovery and negotiations the parties concluded a consent agreement which was endorsed by the court on August 30, 1978. (App. 46a).[4] Under this Consent Decree the defendants were required to implement the I/M program by August 1, 1980. Subsequently, at the request of the defendants, the parties and the court (on March 7, 1980) agreed to a Consent Decree modification which delayed the I/M implementation until May 1, 1981. (App. 67a).

The Consent Decree allowed the state the option of using state controlled (franchise) inspection stations or of using individual private garage inspection stations to inspect automobile exhaust emissions. Consent Decree, para. 4. (App. 51a). The defendants opted for the private garage system.[5] Under this system each private garage desiring to participate in the I/M program must obtain an auto exhaust emission analyzer which meets specifications promulgated by the defendants.

As of February 6, 1981, less than three months before the I/M program was scheduled to start, the defendants had still not promulgated all the regulations necessary

4. Appendix references are to the appendix attached to Petitioners' Brief.

5. The state has successfully operated a private garage system for its automobile safety inspection program.

for establishing or implementing the I/M program. Most notable among these omissions was their failure to publish specifications for the emission analyzers or to publish a list of approved emission analyzers. See 9 Pa. Bull. 4193 (12/12/79), sections 177.35(b) and (c). Without these regulations the private garage owners who desired to participate in the I/M program could not place orders for emission analyzers and thus the I/M program could not be implemented.

On February 6, 1981 the defendants requested Delaware Valley and EPA to support another Consent Decree modification under which the start of the I/M program would be changed from May 1, 1981 to January 1, 1983, a change of 20 months. The defendants claimed their reason for requesting the modification was their desire to conform to an EPA suggestion that states use "computer analyzer" emission testers. The EPA suggestion did not require states to use the "computer analyzer", and EPA advised that the analyzers would be more expensive than other types of acceptable analyzers. Investigation also revealed that the "computer analyzers" had not yet been manufactured, not even in prototype, and that there was no assurance that they would be available in time for January 1, 1983 implementation.

The parties entered into negotiations on the defendants' request for modification but both Delaware Valley (on February 12, 1981) and the EPA plaintiffs (on February 13, 1981) informed the defendants in writing that they expected defendants to comply with the Consent Decree notwithstanding negotiations.

Negotiations broke down on April 28, 1981 when Delaware Valley concluded that the defendants' purpose in seeking the modification was really for the purpose of obtaining more time to attempt to avoid the I/M program entirely. Delaware Valley's conclusion was confirmed shortly thereafter when Pennsylvania Governor Dick Thornburgh wrote to the General Assembly, on July 10, 1981, as follows:

> "My administration is fighting the precipitous implementation of this [I/M] program through the courts. At the same time, we are actively supporting efforts in the Congress to abolish the program and to prevent the loss of federal funds to states which decline to implement it."

It is also important to note that as late as July 19, 1982 no manufacturer has produced, even in prototype, the "computer analyzer" emission testers which defendants wished to specify.

On April 29, 1981 the defendants moved the court for a 20 month delay in I/M implementation. In turn, Delaware Valley, on May 1, moved to declare the defendants in violation of the Consent Decree. The court heard oral arguments on both motions on May 6. At the close of the hearing the district court directed EPA to submit a report on the quality of the air in the geographical areas affected by the lawsuit (the greater Philadelphia and Pittsburgh areas).

On May 20, following receipt of the EPA air quality report, the court issued a memorandum and order (App. 1a) which, inter alia, denied the defendants' motion for modification and declared the defendants to be in violation of the Consent Decree.

The May 20 court order also directed the defendants to submit, by June 1, a proposed plan for the "*immediate* implementation of the I/M program in accordance with the consent decree." (Emphasis in original). (App. 5a). On June 8 Delaware Valley and EPA submitted comments on the proposals and all parties presented oral arguments on the plans and comments on June 10.

The district court, on June 16, issued a comprehensive memorandum and order (App. 6a) setting new schedules for the establishment of the I/M program and clarifying various aspects of the Consent Decree in order to avoid further delay in implementing the program. The court

order accepted the defendants' selection of an emission analyzer (an analyzer that was already being manufactured) and established May 1, 1982 as the new date for I/M implementation. By way of I/M program clarification the June 16 court order required the defendants to establish monthly on-site audits of the participating inspection stations and to establish two independent referee stations for consumer protection. (App. 14a). The court order also provided that the defendants "certify a minimum of 3,000 inspection stations in order to effectively implement this program." (App. 15a).

The Court of Appeals for the Third Circuit heard oral argument on defendants' appeals of the district court orders of May 20 and June 16, 1981 and affirmed in all respects. 674 F. 2d 976 (3rd Cir., March 1, 1982). (App. 17a). The petition for a writ seeks this Court's review of that judgment.

While the parties have been engaged in legal battles before the courts, the Pennsylvania General Assembly has also been engaged in activity vitally affecting the I/M program. On October 5, 1981 the legislature, over the veto of Governor Thornburgh, adopted House Bill 456 Act 99, 10/5/81, 71 P. S. 523) which prohibits the expenditure of public funds to establish or administer the I/M program. As a consequence of House Bill 456 the defendants completely ceased all activity on the I/M program and, in consequence, were declared to be in civil contempt. No. 76-2068, E. D. Pa., 1/22/82. By way of a civil contempt sanction the district court enjoined the United States Secretary of Transportation from making certain grants of federal highway aid to the Commonwealth of Pennsylvania. The court of appeals has confirmed the finding of civil contempt and the civil contempt sanction. No. 82-1104, 3rd Cir., 5/21/82. That judgment is *not* the subject of the present petition.

REASONS FOR DENYING THE WRIT

Summary

It is generally recognized that a writ of certiorari will not be granted unless "there are special and important reasons therefor." Rule 17.1, United States Supreme Court Rules. Respondents, Delaware Valley, contend that the questions presented by petitioners cannot be characterized as either special or important because the court of appeals rendered no opinion in conflict with another federal court of appeals nor did it depart from the accepted and usual course of judicial proceedings.

The questions presented by the petitioners essentially concern matters of district court judicial discretion in the administration of a consent decree. The court of appeals has ruled unanimously that the district court did not abuse its discretion in any respect. The petitioners now seek this Court's determination of whether the district court abused its judicial discretion in administering the Consent Decree.

Petitioners question whether the district court procedures conflict with the requirements established in *Hughes v. United States*, 342 U. S. 353 (1952). *Hughes* requires a court to afford an affected party an evidentiary hearing before modifying a consent decree to impose an additional burden on the party; but the district court, in the case at bar, merely ordered defendants to meet requirements that were explicit or implicit in the existing consent decree and therefore no evidentiary hearing was required.

I. The Court Did Not Abuse Its Discretion in Denying Defendants' Motion to Modify the Consent Decree

It is well established that district courts have the authority to modify a judgment or consent decree. *United States v. Swift & Co.*, 286 U. S. 106, 114-15 (1932). Motions to modify consent decrees are addressed to the sound discretion of the court, *System Federation No. 91 Ry. Employee's Department, AFL-CIO v. Wright*, 364 U. S. 642,

646-47 (1961) and therefore are not to be disturbed except for an abuse of that discretion. *Girard Trust Bank v. Martin*, 477 F. 2d 386 (3rd Cir. 1977), *cert. den.*, 434 U. S. 985 (1977).

The modification of a judgment or consent decree "may be granted only upon a showing of exceptional circumstances", *Philadelphia Welfare Rights Org. v. Shapp*, 602 F. 2d 1114, 1119-20 (3rd Cir. 1979), *cert. den.*, 444 U. S. 1026 (1980); because there is "an overriding interest in the finality of judgments", *Mayberry v. Maroney (I)*, 529 F. 2d 332, 337 (3rd Cir. 1976), especially in cases where the parties made free and calculated choices to submit to a consent decree. *Philadelphia Welfare Rights Org. v. Shapp*, 602 F. 2d 1114, 1120 (3rd Cir. 1979). For these reasons the party seeking to modify a decree:

> "must bear a heavy burden of showing circumstances so changed that 'dangers once substantial, have become attenuated to a shadow,' *United States v. Swift & Co.*, 286 U. S. 106, 119, 52 S. Ct. 460, 464, 76 L. Ed. 999 (1932), and that absent such relief an 'extreme' and 'unexpected' hardship will result."

Mayberry v. Maroney (II), 558 F. 2d 1159, 1163 (3rd Cir. 1977), *International Bhd of Teamsters, Local 249 v. Western Pa. Motor Carriers Ass'n*, 660 F. 2d 76, 85 (3rd Cir. 1981).

On April 29, 1981, just two days before defendants were scheduled to implement the I/M program they moved in district court for a Consent Decree modification which would delay implementation some 20 months. The sole reason advanced for this motion was the defendants' desire to comply with the EPA suggestion to use "computer analyzer" emission testers for the I/M program.

Though EPA suggested the use of "computer analyzers", EPA made clear that other emission testers were acceptable and could be used in the I/M program. Among the drawbacks to the "computer analyzers" was their

higher cost and, most importantly, the fact that none had ever been manufactured, not even in prototype. It was for this latter reason that EPA suggested that states which use "computer analyzers" be given until January 1, 1983 to implement the I/M program.

Delaware Valley opposed the defendants' motion because negotiations failed to convince them that the proposed change would be of sufficient benefit to warrant a 20 month I/M program delay and because defendants could not assure the availability of the "computer analyzer" emission testers nor assure Delaware Valley that they intended to implement the I/M program after the delay.

On May 6 the parties presented oral argument on the motion. Defendants made no argument that extreme or unexpected hardships would result if they were required to comply with the consent decree, nor did the defendants present any argument that the pollution problem had become "attenuated to a shadow".

In fact, it was the district court which requested a report from EPA to determine the extent of air pollution in the areas of Pennsylvania affected by the lawsuit.

On May 20, after receiving the EPA air quality report, the court issued a memorandum and order in which it noted:

> "The report demonstrates that, while air quality in the two regions is improving or presently adequate in respect to some EPA standards, it continues to be wholly inadequate in respect to other EPA standards. For example, the ozone level in the Pittsburgh area not only fails to meet the standard, but has become worse over the past two years. In the Philadelphia area, the ozone level, while decreasing, is still at nearly twice the concentration permitted by the EPA standard. . . ."

(App. 3a). It was, therefore, not unreasonable for the court to deny the defendants' motion. The court explained:

> "The new computer analyzer, which is more expensive, is not now available and though presumably more ac-

> curate than the less expensive available analyzer, the degree of added accuracy is neither necessary nor required by the [EPA]. All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting gas stations to buy, are adequate to fulfill the needs of the I/M program."

District Court Memorandum and Order, May 20, 1981. (App. 2a).

Petitioners contend that the refusal of the district court to comply with the EPA suggestion about using "computer analyzers" constitutes an abuse of judicial discretion. (Pet. Br., p. 13). There is no basis in law for such a legal conclusion and defendants offer no legal support for the conclusion.

Modifications of consent decrees are addressed to the sound discretion of the court, not to the discretion of an administrative agency. Though administrative agency policy warrants the court's most careful consideration such policy pronouncements cannot replace the authority of the court. A per se rule of judicial abuse of discretion, such as defendants propose, would result in administrative agency usurpation of judicial power.

The courts below gave careful consideration to the EPA policy but found it unpersuasive in the light of all the circumstances: the fact that defendants already were 6 years behind schedule; that air pollution remained high; that defendants could not assure the availability of "computer analyzers"; and that test equipment was presently available which could serve the purpose and was satisfactory to the EPA.

The district court's denial of defendants' motion was exhaustively reviewed by the court of appeals (App. 30a-34a) and the appellate court ruled that there had been no abuse of judicial discretion. Petitioners raise no question in respect to this issue which warrants review by the Supreme Court.

II. The Court Did Not Abuse Its Discretion in Declaring Defendants to Be in Violation of the Consent Decree

It is uncontroverted that the defendants did not implement the I/M program on May 1, 1981 nor did they complete the regulatory process required for all aspects of the I/M program. It therefore follows that the defendants violated their obligations under the Consent Decree and should be declared in violation if the court below did not abuse its discretion in denying defendants' motion for a 20 month delay.

Defendants contend they should not be held in violation of the Consent Decree because they were operating in good faith to comply with the EPA suggestion and because Delaware Valley was unreasonable in refusing defendants' request for the 20 month delay.

Regardless of whether defendants have operated in good faith, the absence of willfulness does not relieve a party of its obligations under a consent decree. *McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 191 (1949). Until a court approves a modification a party is obliged to comply with its responsibilities and may not disregard the terms of the existing decree. *Mayberry v. Maroney (I)*, 529 F. 2d 332, 336 (3rd Cir. 1976).

For its part, Delaware Valley had no obligation to agree to a decree modification which it believed to be antithetical to its interests. Defendants suggest, however, that they be relieved of their Consent Decree violations because Delaware Valley refused to accede to their request. Such a concept stands the law on its head; it would relieve all obligors of their duties whenever the obligees did not voluntarily relinquish their claim.

The defendants were obligated to implement the I/M program by May 1, 1981; they did not do so and the court denied their motion to delay the implementation date. The court of appeals found no abuse of judicial discretion by the district court in ruling the defendants to be in violation of the Consent Decree. Petitioners raise no ques-

tion in respect to this issue which warrants review by the Supreme Court.

III. The Court Procedures Did Not Conflict With the Supreme Court Holding in *Hughes v. United States*, 342 U. S. 353 (1952)

The defendants' failure to implement the I/M program and their failure to promulgate the necessary I/M program regulations required the district court to establish new schedules and to clarify the consent decree to avoid further program delays. The court directed defendants to submit a proposed plan for "immediate implementation" of the I/M program (App. 5a) and Delaware Valley and EPA were invited to submit their comments thereon. (App. 5a).

On June 10, 1981 the district court heard oral arguments on the plans and comments and the court, on June 16, issued a comprehensive order designed to expedite the I/M program. The court approved the BAR-80-ADC emission analyzer test equipment (test equipment already in manufacture) and established May 1, 1982 as the new implementation date. Both of these orders were based on defendants' proposals.

By way of clarifying the defendants' responsibilities under the Consent Decree the court ordered the defendants: (a) to establish a system for monthly on-site audits of participating private garage inspection stations (App. 14a); and (b) to establish at least 2 independent referee stations for consumer protection. (App. 14a).

Additionally the district court ordered the defendants to certify a minimum of 3,000 private garage inspection stations to effectively implement the I/M program. (App. 15a).

Defendants allege that the requirements for monthly on-site audits, for independent consumer protection referee stations, and for the certification of at least 3,000 inspection stations are all substantial modifications of the

Consent Decree and impose additional obligations on the defendants. For this reason the defendants allege the district court erred in not affording them an evidentiary hearing. (Pet. Br., pp. 8, 9).

Hughes v. United States, 342 U. S. 353 (1952) requires a court to provide an evidentiary hearing to an affected party before it may substantially modify a consent decree to impose additional responsibilities on that party. 342 U. S. at 357. See also, *United States v. United Foam Corporation*, 565 F. 2d 563, 566 (9th Cir. 1977). *Hughes*, however, does not require an evidentiary hearing where a court merely construes an existing decree; or where the court denies a motion to modify the decree; or where the modification is not substantial in nature.

In *Hughes*, the Supreme Court held that the district court should have afforded defendant Hughes an evidentiary hearing before ordering the sale of Hughes stock by the trustee because such a divestment order constituted a substantial modification of the consent decree and there was "no fair support" for such an obligation in the "language" of the consent decree. 342 U. S. at 357.

In contrast to the district court order involved in *Hughes*, the requirements of the June 16 court order are either explicitly or implicitly contained in the Consent Decree; none can rightly be considered to modify the Consent Decree and none impose any additional obligation on the defendants. The district court's omission of evidentiary hearings on these requirements, therefore, do not conflict with the procedural protections guaranteed by *Hughes*.

In subsections III(A) and III(B) respondents demonstrate that the requirement for monthly audits and for referee stations, respectively, are explicit requirements of the Consent Decree and therefore did not require the court to grant defendants an evidentiary hearing. In section IV respondents demonstrate that the requirement to certify 3,000 private garage inspection stations is implicit in the Consent Decree and imposes no additional obligation on the defendants. Additionally respondents show that no

factual controversy exists regarding the 3,000 garage certifications and, therefore, that no evidentiary hearing is required in any case.

A. Monthly On-Site Audits

There can be no question that the Consent Decree existing prior to the June 16, 1981 court order explicitly provided for monthly on-site audits of the I/M inspection stations. Thus: the Consent Decree modification approved by the court on March 7, 1980 (App. 67a) specifies that "the quality control procedures [be] as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records." Consent Decree Mod., Sched. B., para. 4. (App. 70a). And the Consent Decree modification also provided that "Plaintiffs reserve the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth." Consent Decree Mod., Sched. B., par. 8. (App. 71a).

By specifying that the defendants establish a monthly on-site audit system the June 16 court order did not impose a new obligation on the defendants nor did it enlarge on the obligations already required by the Consent Decree. The district court, therefore, was not required to afford the defendants an evidentiary hearing. It was the defendants who sought to modify the Consent Decree by substituting quarterly on-site audits for monthly on-site visits. (App. 37a). The denial of such a modification request does not require an evidentiary hearing and therefore it cannot be said that the district court acted contrary to *Hughes*.

B. Independent Referee Stations

The requirement that defendants provide at least two independent referee confirming inspection stations for consumer protection was also explicit in the Consent Decree which existed prior to the court order of June 16, 1981. Thus, the Consent Decree modification approved by the

court March 7, 1980 (App. 67a) required the defendants establish at least two "facilities where official confirming inspections may be conducted independent of certified private garages. . . ." Consent Decree Mod., Sched. B, para. 9. (App. 71a, 72a).

The June 16, 1981 court order specifying that defendants establish at least two referee stations, therefore, does not impose any new obligation nor enlarge on any previous obligation in respect to referee stations. Therefore, the district court was not required to afford the defendants an evidentiary hearing on this matter. Here again, it was the defendants who wished to modify the existing Consent Decree by substituting a central complaint office for the two referee stations. The denial of this request for Consent Decree modification does not require the court to provide an evidentiary hearing and therefore the district court did not act in conflict with *Hughes*.

IV. The Court Did Not Abuse Its Discretion in Requiring Defendants to Certify a Minimum of 3,000 I/M Stations

The defendants contend that the district court order of June 16, 1981 requiring defendants to certify a minimum of 3,000 inspection stations (App. 8a, 15a) to establish an effective I/M program was in error in two respects. According to the defendants, this requirement should not have been imposed because defendants had not been afforded an evidentiary hearing (Pet. Br., p. 9) and because the requirement intrudes "into the doctrines of separation of powers and federalism." (Pet. Br., p. 12).

Defendants argue that the Consent Decree did not specify any minimum number of inspection stations and, therefore, the requirement to certify 3,000 stations is a modification adding to their obligations. They do not argue, however, that at least 3,000 stations are required to establish an effective I/M program because they have admitted that they need 8,700 stations to make for an

effective program. (App. 40a). Defendants' underlying argument is that the Consent Decree does not impose any enforceable obligation on them. (See transcript of dialogue at court of appeals hearing, App. 41a, fn. 14). Therefore, say the defendants, if the court specifies any number of certified stations it represents a greater obligation than the Consent Decree and they should be afforded an evidentiary hearing.

Assuming, arguendo, that the district court and the court of appeals are correct in construing the consent decree to require the defendants to implement an effective I/M program there would be an implicit requirement that defendants certify at least as many inspection stations as would be necessary to make for an effective program. Since defendants admit that 8,700 stations may be needed for the program they cannot claim that the June 16 order for 3,000 stations is a greater obligation on the defendants than was implicit in the Consent Decree obligation. It follows, therefore, that if the Consent Decree does obligate the defendants to implement an effective I/M program there is no need for an evidentiary hearing for there are no material facts in dispute.

The court of appeals rejected the defendants' contention that the Consent Decree imposed no obligation on them to effectively implement the I/M program. Said the court of appeals: "Such an argument would make a mockery of the Consent Decree and would work a cruel hoax on the court." (App. 42a).

In respect to the defendants' argument that they could not compel private garages to participate in the program and that therefore they should not be required to certify *even one* inspection station (App. 40a) the circuit court declared:

> "It was always contemplated that the I/M program would be structured such that there would be an economic incentive for private garages to participate . . . .

"We have no reason to believe that if the Commonwealth set about implementing the I/M program in good faith, the goal of 3,000 certified stations could not be met. But even if the number of initially volunteering garages fell short of the number necessary to operate the I/M program adequately, this would not be grounds—as the Commonwealth seems to suggest—for scrapping the decree. The Commonwealth always retains the option to establish its own inspection stations if a shortage of inspection facilities develop . . . ." (App. 42a, 43a).

Anxious to find judicial error wherever they can, defendants allege that the cited paragraph from the court of appeals opinion constitutes a "major and devastating error" (Pet. Br., p. 11) because, say the defendants "there is no authority in any state law which permits the Department [of Transportation] to establish state inspection stations." (Pet. Br., p. 12).

The petitioners make much ado about nothing. Clearly the court of appeals did not order the defendants to establish any state inspection stations and neither did the district court. Both the district court and court of appeals have expressed confidence that with good faith the defendants will be able to structure a program with economic incentives to induce the requisite number of private garages to participate, just as the defendants have successfully done for many years for the state's auto safety inspection program.

The court of appeals' suggestion of possible future *voluntary* action by the defendants to deal with a possible future contingency cannot be interpreted as a federal court order intruding on state prerogatives.

In establishing the requirement for state certification of 3,000 I/M stations the court provided an objective basis for evaluating the defendants' progress in establishing the I/M program. Without such an objective criteria the

court's problem in attempting to administer and expedite the Consent Decree will be far more difficult.

The Consent Decree obligates the defendants to implement an effective I/M program. Implicit in this obligation is the defendants' obligation to induce at least 3,000 garages to participate in the program. It therefore follows that the court did not impose a new obligation on the defendants and therefore that the court's omission of an evidentiary hearing did not conflict with the procedural protections in *Hughes*.

CONCLUSION

For the foregoing reasons Respondents, Delaware Valley, respectfully request that this Court deny the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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[redacted]

No. 91-[redacted]

[redacted]

In the Supreme Court of the United States

October Term, 1991

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]
Solicitor General

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Assistant Attorney General

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[redacted]

[redacted]

QUESTION PRESENTED

Whether the district court erred in its interpretations of a consent decree.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2331

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17a-43a) is reported at 674 F. 2d 976. The opinions and orders of the district court (Pet. App. 1a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1982, and a petition for rehearing was denied on March 26, 1982 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Clean Air Act of 1970, 42 U.S.C. 1857 *et seq.*, required each state to submit to the Environmental Protection Agency (EPA) a state implementation plan for reducing air pollution to meet certain national standards. 42

U.S.C. 1857c-5. Petitioner Commonwealth of Pennsylvania submitted a plan that included, among other things, an inspection and maintenance (I/M) program for automobile emission systems. The EPA modified and promulgated the plan; it specified that the I/M program was to be implemented by May 1, 1975. The I/M program required motor vehicles to be inspected annually to determine if their exhaust emitted excessive amounts of pollutants. If they did, the owners would be required to have the necessary repairs made. The Commonwealth sought review of certain aspects of the plan as promulgated, but it did not seek review of either the requirement that it implement an I/M program or the deadline for implementing that program. Pet. App. 20a-21a.

The Commonwealth never implemented the I/M program. In 1976, respondent Delaware Valley Citizens' Council for Clean Air (Delaware Valley) sued petitioners—the Commonwealth and certain state agencies and officials—in the United States District Court for the Eastern District of Pennsylvania, seeking to require them to implement the I/M program. In 1977 the United States also sued petitioners, seeking similar relief. On August 29, 1978, petitioners entered into a consent decree with Delaware Valley and the United States, agreeing to implement an I/M program for certain areas by August 1, 1980. The consent decree was embodied in an order of the court. Pet. App. 21a-22a.

In March 1980, the parties and the court agreed to extend the deadline for implementing the program to May 1, 1981. The Commonwealth failed to meet that deadline. In February 1981, petitioners still had not issued regulations specifying the equipment needed in the I/M program, and it sought a further extension of the deadline to January 1, 1983. The parties could not agree to this extension. In June 1981, the district court, after learning from the EPA that air quality in the areas covered by the decree still did not meet

the specified national standards, and had in some respects deteriorated, refused to extend the deadline. The court then ordered petitioners to submit a plan for the immediate implementation of the I/M program. The court modified that plan and ordered that it be implemented by May 1, 1982. Pet. App. 23a-25a. The court of appeals unanimously affirmed.[1]

ARGUMENT

Petitioners attack four actions taken by the district court when it ordered the implementation of the plan by May 1, 1982: its requirement that the Commonwealth audit the inspection stations monthly; its requirement that the Commonwealth itself operate two "referee" inspection stations to inspect the vehicles of motorists with complaints about the actions of the other stations, many or all of which were expected to be privately operated; its requirement that the Commonwealth ensure that 3,000 inspection stations were provided; and its refusal further to extend the deadline for compliance with the consent decree.

1. Petitioners repeatedly assert that the requirements imposed by the district court constituted "modifications" of the consent decree. But as the district court (Pet. App. 9a-11a) and the court of appeals (*id.* at 36a-37a, 38a-39a)

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[1]Subsequently, the Pennsylvania legislature enacted a statute prohibiting the expenditure of any funds on the I/M program. On the motion of Delaware Valley, the district court declared the Commonwealth to be in civil contempt and, as a sanction, ordered the Secretary of Transportation not to approve the award of certain highway funds to the Commonwealth. The court of appeals unanimously affirmed this order as well. The Commonwealth has applied for a stay of this judgment of the court of appeals pending the filing of a petition for a writ of certiorari. That application, initially denied by Justice Brennan, was resubmitted to Justice Rehnquist and by him referred to the Court, which has taken no action. A petition for certiorari has since been filed. No. 82-274. However, no question concerning the sanctions is presented by the petition in the present case. See Pet. App. 25a-26a n.5

explained, the consent decree expressly contemplated that the Commonwealth might be required to make monthly audits and to establish two referee stations; the decree explicitly reserved to respondents the right to challenge any alternative measures that were "not as effective as" monthly audits (*id.* at 71a), and it specifically required two "referee" stations unless petitioners devised "an equally effective alternative" (*id.* at 72a). The consent decree also provided (*id.* at 55a):

> Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

And as the court of appeals pointed out (*id.* at 26a-27a, quoting *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932)), even without this provision the district court would have retained the power both to interpret and to modify its order.

The district court, on the basis of submissions by both petitioners and respondents (see Pet. App. 9a, 10a-11a), determined that the alternatives to "referee" stations and monthly audits proposed by petitioners were not equally effective. For example, petitioners proposed that, instead of the "referee" stations, they establish a single central complaints office staffed with inspectors who would be dispatched to investigate complaints; the district court ruled that "common sense" alone dictated that this was not as effective a procedure as two stations operated by the Commonwealth that could themselves conduct investigations.

Id. at 10a-11a. Thus, as the court of appeals stated, when the district court required two "referee" stations and monthly audits it "did not increase the obligations to which the Commonwealth had already agreed when it signed the * * * decree" (*id.* at 29a). This case is therefore wholly unlike *Hughes* v. *United States*, 342 U.S. 353 (1952), on which petitioners rely; in *Hughes*, the district court's order violated the terms of the consent decree, imposing on a party an obligation he had specifically not accepted. *Id.* at 356-357.

Petitioners also criticize the district court's decision to decide the issues on the basis of the papers submitted, instead of hearing testimony (Pet. 8-11). Petitioners acknowledge that they had notice that the district court would be asked to impose the requirements at issue here; indeed, petitioners assert that they had obtained witnesses who were prepared to testify about those requirements. Pet. 6. Thus petitioners' only objection is that they were not allowed to introduce evidence in the form they preferred. Such matters are confided to the discretion of the district court, and the court of appeals, relying on its precedent, upheld the district court's exercise of its discretion. Pet. App. 28a-29a.

2. The district court required petitioners to certify 3,000 inspection stations only after learning that 2,274 stations had already been partially certified. Pet. App. 8a. Petitioners assert (Pet. 11-12) that they should be relieved of this requirement because they cannot compel private parties to participate in the I/M program and no state law authorizes them to establish state inspection stations. Pet. 12.

Petitioners made clear in the court of appeals (and do not now deny) that they do not consider 3,000 to be an unreasonable number of stations; in fact, they initially expected to establish 8,700 stations. Pet. App. 40a. The consent decree, by requiring an inspection and maintenance program,

necessarily required that *some* inspection stations be established, and it was within the district court's power to ensure the effective implementation of the decree by designating a reasonable number. As the court of appeals explained (*id.* at 41a-43a):

> The Commonwealth in effect is asserting that the consent decree into which it entered imposed *no* real obligation on it to ensure that vehicle inspections took place and that pollutant emissions were reduced. * * *
>
> Although the requirement that a certain number of inspection stations be certified is not explicitly set forth in the decree, it is necessarily implicit in it. To hold otherwise would turn the decree into an empty promise. When it signed the decree, the Commonwealth must have known that the attainment of the decree's objectives would require a certain minimum number of inspection stations to be established, and that it was the Commonwealth's duty under the decree to see that this was done. * * *
>
> * * * * *
>
> We have no reason to believe that if the Commonwealth set about implementing the I/M program in good faith, the goal of 3,000 certified stations could not be met. * * * We thus hold that the district court did not abuse its discretion in requiring the Commonwealth to certify 3,000 inspection stations by May 1, 1982.

3. Petitioners also contend (Pet. 12-14) that the district court erred in not granting yet another extension of the deadline for compliance, to January 1, 1983. Petitioner asserts that it sought this extension so that it could use a newer emissions analyzer in its I/M program. The district court explained its reasons for not allowing this extension (Pet. App. 2a):

> The new computer analyzer, which is more expensive, is not now available and, though presumably more accurate than the less expensive available analyzer, the degree of added accuracy is neither necessary nor required by the [EPA]. All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting * * * stations to buy, are adequate to fulfill the needs of the I/M program.

The district court also noted that the quality of the air in the areas covered by the I/M program did not meet the specified standards and had continued to deteriorate in some respects (Pet. App. 3a). Petitioners gave no assurance that the new analyzer would be available even by January 1, 1983 (*id.* at 33a); the analyzer had not yet been manufactured, even in prototype, at the time petitioners sought the extension (*id.* at 31a). In view of the Commonwealth's already extraordinary delays—the I/M program was originally supposed to be implemented by May 1, 1975—the court of appeals was clearly correct in concluding that the district court did not abuse its discretion in declining to allow a further extension.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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